

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59538; File No. SR-Phlx-2009-17)

March 9, 2009

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing of a Proposed Rule Change Relating to the Nomination and Election of Candidates for Governor and Independent Governor

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on February 23, 2009, NASDAQ OMX PHLX, Inc. (“Phlx” or the “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 Phlx. 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 its By-Laws to: (i) replace the current “Nominating, Elections and Governance Committee” with a newly named “Nominating Committee” and a “Member Nominating Committee”; (ii) modify the processes for nominating candidates for Governor and Designated Independent Governor; (iii) modify the procedures for Member Organization Representatives to vote for Designated Governor nominees and the procedures for meetings of Members and Member Organizations; (iv) modify the procedures for filling vacancies on the Board of Governors; (v) modify the definitions of “Independent Governor”, “Trust Agreement” and add the following definitions: “Industry Member”, “Non-Industry Member”, “Public Member”, “Member Representative member”, “Contested Vote”, “List of Candidates”, “Member Voting Record Date” and “Voting Date”; and (vi) amend the Certificate

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

of Incorporation and By-Laws to eliminate the Vice Chair and PBOT Governor positions from the Board of Governors.

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.

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

1. Purpose

The purpose of the proposed rule change is to streamline the processes related to the nomination and election of candidates for Governor and Designated Independent Governor positions and to conform the NASDAQ OMX PHLX, Inc. governance structure to that of The NASDAQ Stock Market LLC.³ To that end, the proposal establishes independent Nominating

³ The NASDAQ Stock Market LLC is a subsidiary of NASDAQ OMX GROUP, Inc., the parent company of NASDAQ OMX PHLX, Inc. On July 24, 2008, The NASDAQ OMX GROUP, Inc. acquired the Philadelphia Stock Exchange, Inc. See Securities Exchange Act Release No. 58098 (July 17, 2008), 73 FR 42850 (July 23, 2008) (SR-NASDAQ-2008-035) [sic]. Currently, the process for selection of Governors differs between NASDAQ OMX PHLX, Inc. and The NASDAQ Stock Market LLC. See Securities Exchange Act Release No. 57757 (May 1, 2008), 73 FR 26159 (May 8, 2008)(SR-BSE-2008-23)(Pursuant to a merger with The NASDAQ OMX Group, Inc., the Boston Stock Exchange, Inc. proposed to adopt By-Laws similar in all material respects to the By-

and Member Nominating Committees, modifies the process for nominating candidates for Governor and Designated Independent Governor and the procedures for Member Organization Representatives⁴ to vote for Designated Governor nominees and eliminates the Vice Chair and PBOT Governor positions on the Board similar to The NASDAQ Stock Market LLC, structure.

Nominating and Election of Governors

Current Nominating Process

Currently, the Nominating, Elections and Governance Committee is comprised of five members including four Independent Governors⁵ (one of whom must be a Designated Independent Governor⁶) and one Member Governor⁷. The Nominating, Elections and

Laws of The NASDAQ Stock Market LLC so that the exchanges could be operated with similar governance structures.)

⁴ Pursuant to By-Law Article I, Section 1-1(w), the term “Member Organization Representative” means the officer (or person in a similar position) of a Member Organization designated by such Member Organization as such Member Organization's Member Organization Representative, who shall have the sole authority, with respect to the selection or removal of Designated Nominees as defined in Section 3-2(a) to exercise any and all rights and to take any and all actions on behalf of such Member Organization and each Member who has designated such Member Organization as his primary affiliation.

⁵ By-Law Article I, Section 1-1(p) defines an Independent Governor as “...a Governor who must satisfy the definition of Independent as set forth herein and is duly elected to fill one of the vacancies on the Board of Governors allocated to the Independent Governors.” By-Law Article I, Section 1-1(o) defines Independent as “The term “Independent” when used in the context of Governors or committee members, shall mean persons affirmatively determined by the Board as having no Material Relationship with the Exchange or any affiliate of the Exchange, any Member of the Exchange or any affiliate of such Member, or any issuer of securities that are listed or traded on the Exchange or a facility of the Exchange.”

⁶ By-Law Article I, Section 1-1(f) defines a Designated Independent Governor as, “...those...who are elected by the holder of the Series A Preferred Stock in accordance with Article SIXTH of the Certificate of Incorporation.”

⁷ By-Law Article I, Section 1-1(u) defines a Member Governor as, “...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 (1) vacancy on the Board of Governors allocated to the Member Governor.”

Governance Committee submits nominations for the positions of Designated Governors from candidates selected in accordance with Exchange By-Law Article III, Section 3-4 and 3-6 concerning qualifications and recommendations received at open meetings and in writing by the Secretary of the Exchange. The Nominating, Elections and Governance Committee holds at least two (2) open meetings to receive recommendations for the positions of Designated Independent Governors or Member Governor.⁸ Recommendations may be made by any Member, participant or Member Organization Representative or by any Member of the Nominating, Elections or Governance Committee then in office and may be submitted in writing or in person.⁹ Independent nominations for the positions of Designated Governors may be made by a written petition by Member Organization Representatives and filed with the Secretary of the Exchange in a sealed envelope within two (2) weeks after the posting of the report of the Nominating, Elections and Governance Committee to the Member Organization Representatives.¹⁰ Nominations are valid only when signed by Member Organization Representatives representing not less than fifty (50) votes.¹¹

At the annual meeting of Members and Member Organizations, Member Organization representatives elect the Designated Governors, who are then elected at the annual Stockholders meeting by the holder of the Series A Preferred Stock.¹² At the annual meeting of stockholders,

⁸ See By-Law Article III, Section 3-6.

⁹ See By-Law Article III, Section 3-6.

¹⁰ See By-Law Article III, Section 3-7.

¹¹ See By-Law Article III, Section 3-7. Further, “[a] Member Organization Representative shall not endorse more than one (1) nominee per vacancy; provided, however, that the Member Organization Representatives representing not less than seventy-five (75) votes may, by petition, propose an entire ticket, or any portion thereof, for the vacancies of Designated Governors on the Board of Governors to be filled at the ensuing election.”

¹² See Phlx By-Laws, Article III, Section 3-2(a) and Article XXVIII, Section 28-2. On February 22, 2007, the Philadelphia Stock Exchange, Inc. (now NASDAQ OMX PHLX,

the Holder of Common Stock presents for nomination to the Nominating, Elections and Governance Committee the candidates for Vice Chair, Stockholder Governor and Independent Governors for placement on the ballot for election by the Holder of Common Stock.¹³

Proposed Nominating Process

Under the proposed rule change, By-Law Article III, Sections 3-4, 3-6, 3-7 and 3-16, Article X, Sections 10-1 and 10-19, Article XI, Section 11-1 and Article XXVIII, Sections 28-3, 28-8 and 28-12 would be amended to replace the current “Nominating, Elections and Governance Committee” with a newly named “Nominating Committee” and a “Member Nominating Committee” as well as modify the processes for nominating candidates for Governor and Designated Independent Governor. Further, By-Law Article III, Sections 3-2, 3-3, 3-4, 3-6, 3-7, 3-8, 3-11, 3-12, 3-13 and 3-14, and Article XXVIII, Section 28-2 would be amended to modify the procedures for Member Organization Representatives to vote for Designated Governor nominees and the procedures for meetings of Members and Member Organizations. These proposed amendments would conform the NASDAQ OMX PHLX, Inc. By-Laws to those of The NASDAQ Stock Market LLC.

The proposed rule change amends By-Law Article III, Sections 3-2 and 3-7 so that Designated Governors would be elected to the Board of Governors on an annual basis.¹⁴ For

Inc.) entered into a Third Amended and Restated Trust Agreement with Wilmington Trust Company. The Exchange issued to the Trust one share of Series A Preferred Stock, which share has the exclusive right to elect and remove Designated Governors. Wilmington Trust is the Trustee of the Trust pursuant to the agreement.

¹³ See By-Law Article XXVIII, Section 28-3.

¹⁴ See similar provision in The NASDAQ Stock Market LLC By-Laws at Article II, Section 1. Currently, Governors are elected for terms of one year.

each annual election, the Board of Governors would select a Member Voting Record Date¹⁵ and a Voting Date.¹⁶ The Member Voting Record Date would be at least 10 days but not more than 60 days prior to the Voting Date.¹⁷ The Member Nominating Committee would create a list of one or more candidates for each Designated Governor position on the Board to be elected by the Series A Preferred Stock at the annual meeting of Stockholders or a special meeting in lieu thereof.¹⁸ Promptly after selection of the Voting Date, in a notice transmitted to Member Organization Representatives and in a prominent location on a publicly accessible website, the Exchange (i) shall announce the Voting Date and the List of Candidates,¹⁹ and (ii) shall describe the procedures for Member Organization Representatives to nominate candidates for election at the next annual meeting of Stockholders. In the Event of a Contested Vote,²⁰ the Exchange shall also send Member Organization Representatives formal notice, which notice shall be sent by the Exchange at least 10 days but no more than 60 days prior to the Voting Date to the Member Organization Representatives of persons that were Member Organizations on the Member Voting Record Date, by any means, including electronic transmission, as determined by the Board of Governors or committee thereof.²¹ The notice shall indicate by appropriate designation

¹⁵ A Member Voting Record Date definition is proposed herein under the section titled Definitions.

¹⁶ A Voting Date definition is proposed herein under the section titled Definitions.

¹⁷ See similar provision in The NASDAQ Stock Market LLC By-Laws at Article II, Section 1.

¹⁸ This provision is similar to Exchange By-Law Article III, Sections 3-2 in that the Series A Preferred Stock Holder would continue to be the mechanism to elect the Member nominees. Moreover, it is similar The NASDAQ Stock Market LLC By-Law Article II, Section 1, in that the Member Nominating Committee creates the List of Candidates.

¹⁹ A List of Candidates definition is proposed herein under the section titled Definitions.

²⁰ A Contested Vote definition is proposed herein under the section titled Definitions.

²¹ See similar provision in The NASDAQ Stock Market LLC By-Laws at Article II, Section 1.

whether each person on the List of Candidates is a Member or a foreign currency options participant of the Exchange or is a non-member or non-foreign currency options participant of the Exchange who is a general partner or executive officer (vice-president or above) of a Member Organization or participant organization of the Exchange or is nominated to be a Designated Independent Governor.

An additional candidate may be added to the List of Candidates by a Member Organization Representative that submits a timely and duly executed written nomination to the Secretary of the Exchange. To be timely, a Member Organization Representative's notice would be delivered to the Secretary at the principal executive offices of the Exchange not later than the close of business on the 90th day nor earlier than the close of business on the 120th day prior to the first anniversary of the preceding year's Voting Date, provided however that in the event that the Voting Date is more than 30 days before or more than 70 days after such anniversary date, notice by the Member Organization Representative must be so delivered not earlier than the close of business on the 120th day prior to such Voting Date and not later than the close of business on the later of the 90th day prior to such Voting Date or the tenth day following the day on which public announcement of such Voting Date is first made by the Exchange.²² Such Member Organization Representative's notice shall set forth: (i) as to the person whom the Member Organization Representative proposes to nominate for election as a Designated Governor, all information relating to that person that is required to be disclosed in solicitations of proxies for election of directors in an election contest, or is otherwise required, in each case pursuant to Regulation 14A under the Exchange Act and the rules thereunder (and such person's written consent to be named in the List of Candidates as a nominee and to serving as a Governor

²² See similar provision in The NASDAQ Stock Market LLC By-Laws at Article II, Section 1.

if elected); (ii) a petition in support of the nomination duly executed by the Member Organization Representatives of 10% or more of all Member Organizations; and (iii) the name and address of the Member Organization Representative making the nomination.²³ The Exchange may require any proposed nominee to furnish such other information as it may reasonably require to determine the eligibility of such proposed nominee to serve as a Designated Governor.²⁴

If by the date on which a Member Organization Representative may no longer submit a timely nomination, there is only one candidate for each Designated Governor position to be voted on the Voting Date, the candidates on the List of Candidates shall be the “Designated Nominees,” which the holder of the Series A Preferred Stock shall be required to elect as Designated Governors in accordance with the Certificate of Incorporation at Article Sixth as well as the Trust Agreement. In the event of a Contested Vote, the Exchange would conduct a vote to determine the Designated Nominees in accordance with proposed Article III, Section 3-7.²⁵

If there is a Contested Vote, the Designated Nominees would be selected through a balloting process but without a formal meeting of the Members and Member Organizations. A formal notice of the Voting Date and the List of Candidates would be sent by the Exchange at least 10 days but no more than 60 days prior to the Voting Date to the Member Organization Representatives of persons that were Member Organizations on the Member Voting Record Date, by any means, including electronic transmission, as determined by the Board of Governors

²³ See similar provision in The NASDAQ Stock Market LLC By-Laws at Article II, Section 1.

²⁴ See similar provisions in The NASDAQ Stock Market LLC By-Laws at Article II, Section 1, which relates to the nomination of alternate candidates.

²⁵ See similar provisions in The NASDAQ Stock Market LLC By-Laws at Article II, Section 1.

or committee thereof.²⁶ The notice would indicate whether each person on the List of Candidates was a Member or foreign currency options participant of the Exchange or a non-member or non-foreign currency options participant of the Exchange who is a general partner or executive officer of a Member Organization or participant organization of the Exchange or is nominated to be a Designated Independent Governor.

Votes would be cast by written ballot, electronic submission, or any other means as set forth in a notice to the Member Organization Representatives sent by the Exchange prior to the Voting Date. Only votes received prior to 11:59 p.m. Eastern Time on the Voting Date would count for the election of a Designated Nominee.²⁷ The vote would not be valid unless a majority of the Member Organization Representatives entitled to vote cast a vote; if a quorum is lacking, the Board of Governors would declare a subsequent Voting Date and Member Voting Record Date for the purpose of selecting Designated Nominees and would again follow the procedures for conducting a Contested Election. These voting provisions replace the current secret written ballot provisions in Article III, Section 3-12. Minor technical amendments were made to Exchange By-Law Article III, Section 3-13 related to quorums for meetings of Member and Member Organizations.

The persons on the List of Candidates receiving the highest number of votes for the category of Governor for which they were nominated would be declared the Designated Nominees for their respective positions as Designated Governors. In the case of a tie, the names of the proposed Designated Governors involved in such tie would be referred to the Member Nominating Committee, which would make the selection as to who among such tying proposed

²⁶ See similar provisions in The NASDAQ Stock Market LLC By-Laws at Article II, Section 1.

²⁷ See similar provision in The NASDAQ Stock Market LLC By-Laws at Article II, Section 1 [sic].

Designated Governors would be nominated as the Designated Nominees for election at the Annual Meeting of Stockholders.

Except as provided in these By-Laws, the Exchange shall not be required to hold meetings of Members, Member Organizations, or Member Organization Representatives. If such a meeting is held, however, the By-Laws currently state that any notice of the meeting shall be in writing and state the place, date, hour and purpose of such meeting and shall not be given less than ten days before the date of the meeting nor more than fifty days before the date of the meeting. Exchange By-Law Article III, Section 3-11 is proposed to be amended to provide that the notice shall not be given less than ten days before the date of the meeting nor more than sixty days before the date of the meeting. Also, language is proposed to be added to that By-Law to state that notice may be sent via mail or electronic transmission and if notice is sent via electronic transmission, notice is given when sent to the e-mail address of the Member Organization Representative as it appears on the books and records of the Exchange.

Composition of Nominating Committee

This proposed rule change would amend Exchange By-Law Article X, Section 10-19 to create a Nominating Committee which would nominate candidates for all other vacant or new Governor positions on the Board of Governors that are not nominated by the Member Nominating Committee. The Nominating Committee would consist of no fewer than six (6) and no more than nine (9) members and the number of Non-Industry members would equal or exceed the number of Industry members on the Committee. If the Nominating Committee consists of six (6) members, at least two (2) shall be Public Members. If the Nominating Committee consists of seven (7) or more members, at least three shall be Public members. Also, no officer or employee of the Company shall serve as a member of the Nominating Committee in any

voting or non-voting capacity. No more than three of the Nominating Committee members and no more than two of the Industry members shall be current Governors. Finally, a Nominating Committee member may not simultaneously serve on the Nominating Committee and the Board of Governors unless such member is in his or her final year of service on the Board of Governors and following that year, that member may not stand for election to the Board of Governors until such time as he or she is no longer a member of the Nominating Committee. Members of this Committee would be appointed annually and may be removed by a majority vote of the Board of Governors.²⁸ The Exchange's proposed amendments to the Nominating Committee's composition and number of members attempts to fairly represent the various interests of the membership and trading community, including investors. Also the public governors should bring diverse experience to the nominating process.

Composition of Member Nominating Committee

The proposal would amend Exchange By-Law Article X, Section 10-19 to create a Member Nominating Committee which would nominate candidates for each Designated Governor position on the Board of Governors and also nominate candidates for appointment by the Board for each vacant or new position on any committee that is to be filled with a Member Representative member. The Member Nominating Committee would consist of no fewer than three (3) and no more than six (6) members. All members of the Member Nominating Committee would be a current associated person of a current Member Organization. The Board of Governors would appoint such individuals after consultation with Member Organization

²⁸ The provisions related to the Nominating Committee are similar to the provisions in The NASDAQ Stock Market LLC By-Laws at Article III, Section 6.

Representatives. Members of this Committee would be appointed annually and may be removed by a majority vote of the Board of Governors.²⁹

By-Law Article X, Section 10-19 proposes to add language that the Secretary shall collect from each nominee for Governor such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as a Member Governor, Stockholder Governor, or Independent Governor, or Designated Governor, if applicable, and the Secretary shall certify to the Nominating Committee or the Member Nominating Committee each nominee's classification, if applicable. Governors would update the information submitted under this subsection at least annually and upon request of the Secretary, and shall report immediately to the Secretary.

Board of Governor Vacancies and Resignations

Under the proposed rule change, By-Law Article III, Section 3-8, Article IV, Sections 4-6 and 4-7 and Article XXVIII, Section 28-4 would be amended to modify the procedures for filling vacancies on the Board of Governors. Currently, vacancies are filled by the Nominating, Elections and Governance Committee, subject to the approval by a majority of the Governors then in office, although less than a quorum, or by a sole remaining Governor.³⁰ The proposed rule change would provide that in the event of a vacancy on the Board occurring between annual meetings, the appropriate nominating committee would nominate, and the Board would appoint, a replacement Governor to fill the vacancy.³¹

²⁹ The provisions related to the Member Nominating Committee are similar to the provisions in The NASDAQ Stock Market LLC By-Laws at Article III, Section 6.

³⁰ See By-Law Article IV, Section 4-7.

³¹ See similar provisions in The NASDAQ Stock Market LLC By-Laws at Article II, Section 3.

Amendments are also proposed to Exchange By-Law Article IV, Section 4-6 to modify the timeframes associated with submitting Board resignations. Currently a Board member may resign at any time by submitting a written resignation to the Exchange which shall take effect at the time of its receipt by the Exchange unless another time is fixed in the resignation.³² In the event of a merger, consolidation or other acquisition, the Board member is currently required to notify the Chair of the Board of Governors of their resignation by the first day of the January preceding the next annual meeting of Stockholders. This proposal seeks to revise the timeframe in the event of a merger, consolidation or other acquisition to state that a Board member is required to notify the Chair of the Board of Governors of their resignation by the first day of the following month of their resignation. Similarly, in the event of a change in occupational category or Member Organization or participant organization, such Governor is currently required to notify the Chair of the Board of Governors of his resignation by the first day of the January preceding the next annual election. This proposal seeks to amend this language to similarly state that the Board member shall notify the Chair in the event of an occupational category or Member Organization or participant organization by the first day of the following month. Additionally, Article IV, Section 4-6 indicates that as related to resignations in the event of a merger, consolidation, or other acquisition or because of a change in occupational category, the resignations shall become effective no later than the expiration of the term of the outgoing class of Governors. This language is being deleted as it is no longer applicable. By providing a shorter time period to provide notification, the Exchange is ensuring that the Board members will continue to be qualified to serve on the Board in their respective positions as opposed to a longer notification period.

³² See By-Law Article IV, Section 4-6.

Definitions

The Exchange proposes to amend the definitions of “Independent Governor”, and “Trust Agreement” and add the definitions for “Industry Member”, “Non-Industry Member” and “Public Member.” The proposed rule change would amend the definition of Independent Governor as follows: the term “Independent Governor” shall mean a Governor who has no material relationship with the Exchange or any affiliate of the Exchange, any Member of the Exchange or any affiliate of such Member, or any issuer of securities that are listed or traded on the Exchange or a facility of the Exchange and is duly elected to fill one of the vacancies on the Board of Governors allocated to the Independent Governors. The term “material relationship” will be defined as a relationship, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision-making of the Governor.³³ Also, the Exchange proposes to amend By-Law Article I, Section 1-1-(dd) to modify the definition of Trust Agreement to include language that indicates that such agreement may be amended from time to time.³⁴

The Exchange proposes adding the following definition to Article I, Section 1-1, “Industry Member”, “Non-Industry Member” and “Public Member” as these amendments correspond to the proposed amendments to the election process of Designated Governors. The term “Industry Member” is proposed to be added to Article I, Section 1-1(pp) and shall mean a member of any committee appointed by the Board of Governors who (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

³³ See footnote 5 for current Independent Governor and Independent definitions.

³⁴ The term “Trust Agreement” is currently defined as the Third Amended and Restated Trust Agreement, dated as of February 22, 2007, between the Exchange and the trustee under such Trust Agreement.

officer, director (excluding an outside director), or employee of an entity that owns more than ten percent of the equity of a broker or dealer, and the broker or dealer accounts for more than five percent of the gross revenues received by the consolidated entity; (iii) owns more than five percent of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed ten percent 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 percent or more of the professional revenues received by the committee member or 20 percent or more of the gross revenues received by the committee member's firm or partnership; (v) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50 percent 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 percent or more of the professional revenues received by the committee member or 20 percent or more of the gross revenues received by the committee 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 to FINRA (or any predecessor) or has had any such relationship or provided any such services at any time within the prior three years.³⁵

The term "Non-Industry Member" is proposed to be added at Article I, Section 1-1(rr) and shall mean a member of any committee appointed by the Board of Governors who is (i) a Public member; (ii) an officer, director, or employee of an issuer of securities listed on the

³⁵ This definition is substantially similar to the same term found in The NASDAQ Stock Market LLC By-Laws at Article I.

Exchange; or (iii) any other individual who would not be an Industry member.³⁶ The term “Public Member is proposed to be added at Article I, Section 1-1(ss) and shall mean a member of any committee appointed by the Board of Governors who has no material business relationship with a broker or dealer, the Exchange, or its affiliates.³⁷

The term “Member Representative member” is proposed to be added at Article I, Section 1-1(qq) and shall mean a member of any committee appointed by the Board of Governors who has been elected or appointed after having been nominated by the Member Nominating Committee pursuant to these By-Laws.³⁸ The term “Contested Vote” is proposed to be added at Article I, Section 1-1(mm) and shall mean a process for selection of one or more Designated Governors for which the number of candidates on the List of Candidates exceeds the number of positions to be elected by the holder of the Series A Preferred Stock.³⁹ The term “List of Candidates” is proposed to be added at Article I, Section 1-1(nn) and shall mean the list of candidates for Designated Governor positions to be voted upon by Member Organization Representatives on a Voting Date.⁴⁰ The term “Member Voting Record Date” ” is proposed to be added at Article I, Section 1-1(oo) and shall mean a date selected by the Board of Governors for the purpose of determining the Member Organization Representatives entitled to vote for

³⁶ This definition is substantially similar to the same term in The NASDAQ Stock Market LLC By-Laws at Article I.

³⁷ This definition is substantially similar to the same term found in The NASDAQ Stock Market LLC By-Laws at Article I.

³⁸ This definition is substantially similar to the same term found in The NASDAQ Stock Market LLC By-Laws at Article I.

³⁹ This definition is substantially similar to that of Contested Election found in The NASDAQ Stock Market LLC By-Laws at Article I.

⁴⁰ This definition is substantially similar to the same term found in The NASDAQ Stock Market LLC By-Laws at Article I.

Designated Governors on a Voting Date in the event of a Contested Vote.⁴¹ Finally, the term “Voting Date” is proposed to be added at Article I, Section 1-1(tt) and shall mean a date selected by the Board of Governors for Member Organization Representatives to vote with respect to Designated Governors in the event of a Contested Vote.⁴²

The amended and newly added definitions are necessary to effectuate the amendments proposed herein related to the nominating process to elect Designated Governors.

Vice Chair and PBOT Governor Elimination

The Exchange’s proposed rule change seeks to amend the Certificate of Incorporation and delete By-Law Article V, Section 5-3 to delete the Vice Chair position as well as amend By-Law Article 1, Section 1-1, Article III, Section 3-16, Article IV, Sections 4-1 and 4-14, Article X, Sections 10-14 and 10-15 and Article XXVIII, Sections 28-3 and 28-12 to eliminate references to the Vice Chair position.⁴³

After integration and a period of time functioning under a global holding company structure, the Exchange has determined that eliminating this position would streamline the governance structure. The NASDAQ Stock Market does not have a Vice Chair. References to the Vice Chair are being deleted, including a description of who may serve as Vice Chair, which appears in the Certificate of Incorporation and By-laws, as well as the current function of the Vice Chair to preside over Board meetings in the absence of the Chair of the Board of Governors.

⁴¹ This definition is substantially similar to that of Record Date found in The NASDAQ Stock Market LLC By-Laws at Article I.

⁴² This definition is substantially similar to that of Election Date found in The NASDAQ Stock Market LLC By-Laws at Article I.

⁴³ The Vice Chair is elected by the Holder of Common Stock and does not effect the fair representation requirement.

The Exchange proposes to amend the Certificate of Incorporation and By-Law Article I, Sections 1-1(e) and 1-1(aa), Article IV, Section 4-1 and Article V, Section 5-3 [sic] to delete the position of PBOT Governor. Since the Philadelphia Board of Trade, Inc (“PBOT”)⁴⁴ now has the status of one of multiple subsidiaries within a global holding company structure, it is no longer appropriate to provide its members special representation on the Exchange board, which is likewise a NASDAQ OMX subsidiary. The PBOT Governor position would be replaced with a Designated Independent Governor. The Exchange’s proposed changes will continue to provide for a fair representation of its members on the Board of Governors.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act⁴⁵ in general, and furthers the objectives of: (1) Section 6(b)(1) of the Act,⁴⁶ which requires a national securities exchange to be so organized and have the capacity to carry out purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act; (2) Section 6(b)(3) of the Act,⁴⁷ which requires that the rules of a national securities exchange assume the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker or dealer (the “fair representation requirement”); and Section 6(b)(5) of the Act,⁴⁸ in that it is designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and

⁴⁴ PBOT recently changed its corporate name to NASDAQ OMX Futures Exchange, Inc.

⁴⁵ 15 U.S.C. 78f(b).

⁴⁶ 15 U.S.C. 78(b)(1). [sic]

⁴⁷ 15 U.S.C. 78(b)(3). [sic]

⁴⁸ 15 U.S.C. 78f(b)(5).

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, Members will continue to be represented on the Board and on key standing committees, and will have a voice in the selection of Governors through the Member Nominating Committee and the ability to nominate alternate candidates and thereby cause a Contested Vote in which all Member Organization Representatives may vote.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be 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 e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2009-17 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-Phlx-2009-17. 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 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 inspection and copying 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 Phlx. 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 publicly available.

All submissions should refer to File Number SR-Phlx-2009-17 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.⁴⁹

Florence E. Harmon
Deputy Secretary

⁴⁹ 17 CFR 200.30-3(a)(12).