

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59794; File No. SR-Phlx-2009-17)

April 20, 2009

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

On February 23, 2009, NASDAQ OMX PHLX, Inc. (“Phlx” or the “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 amend its Certificate of Incorporation and By-Laws to modify its processes relating to the nomination and election of candidates for the Board of Governors (“Board”). The proposed rule change was published for comment in the Federal Register on March 16, 2009.³ The Commission received no comments regarding the proposal. This order approves the proposed rule change.

In its filing, the Exchange sought to conform its governance structure, including its process for the nomination and election of candidates for Governor and Designated Independent Governor positions, to more closely resemble that of its corporate sibling, The NASDAQ Stock Market LLC (“Nasdaq”).⁴ In particular, the Exchange proposed several changes to its governance structure, including (i) bifurcating the “Nominating, Elections and Governance Committee” into a separate “Nominating Committee” and a “Member Nominating Committee”; (ii) modifying the processes for nominating candidates for Governor and Designated Independent Governor; (iii) modifying the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59538 (March 9, 2009), 74 FR 11152 (“Notice”).

⁴ Both the Exchange and Nasdaq are subsidiaries of The NASDAQ OMX GROUP, Inc. See Securities Exchange Act Release No. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR-Phlx-2008-31) (order approving changes to the Exchange’s governing documents in connection with its acquisition by The NASDAQ OMX Group, Inc.).

procedures for Member Organization Representatives to vote for Designated Governor nominees and the procedures for meetings of Members and Member Organizations; (iv) changing the procedures for filling vacancies on the Board, and the timeframe for submitting Board resignations; and (v) adding several new definitions, including “Industry Member,” “Non-Industry Member,” and “Member Representative member.” The Exchange also proposed to amend its Certificate of Incorporation and its By-Laws to delete the positions of Vice Chair and PBOT Governor.

The Commission has carefully reviewed the proposed rule change and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange⁵ including, in particular, Section 6(b)(1) of the Act,⁶ which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act; Section 6(b)(3) of the Act,⁷ which requires that the rules of a national securities exchange assure a fair representation of its members in the selection of its directors and administration of its affairs, and provided 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; and Section 6(b)(5) of the Act,⁸ which requires that an exchange have rules designed to prevent fraudulent and manipulative acts and practices, 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, protect investors and the public interest.

⁵ In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁶ 15 U.S.C. 78f(b)(1).

⁷ 15 U.S.C. 78f(b)(3).

⁸ 15 U.S.C. 78f(b)(5).

Among other things, the Exchange proposed to bifurcate its Nominating, Elections and Governance Committee into (1) a Member Nominating Committee that would be responsible for nominating candidates for each vacant Designated Governor⁹ position and would 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, and (2) a Nominating Committee that would nominate candidates for all other vacant Governor positions that are not nominated by the Member Nominating Committee. All members of the Member Nominating Committee would be a current associated person of a current member organization and would be appointed annually by the Board following consultations with Member Organization Representatives. The Nominating Committee would consist of a number of non-industry members that equal or exceed the number of industry members. In addition, a number of Public Members would be represented on the Nominating Committee, and no officer or employee of the Exchange could serve in any voting or non-voting capacity on the committee.

Further, the Exchange proposed to modify its nominating process, including the procedures for Member Organization Representatives to vote for Designated Governor nominees and the procedures for meetings of Members and Member Organizations, to more closely align them with Nasdaq's process and procedures. Among other things, the proposed procedures would continue to afford Member Organization Representatives the ability to nominate candidates for Designated Governor positions subject to certain conditions. In addition, in the event of a contested vote for a Designated Governor position, Member Organization Representatives would have the opportunity

⁹ The term "Designated Governor," which includes the Member Governor and a number of Designated Independent Governors, refers to a Governor who is selected through a process that is subject to the input of the Exchange's Member Organization Representatives. See Proposed Phlx By-Law Article I, Section 1-1(e) (defining "Designated Governor" as proposed to be amended by Phlx to exclude the PBOT Governor position).

to vote on the list of candidates, and the Exchange would utilize a balloting process rather than hold a formal meeting of members.

The Exchange also proposed to delete the position of Vice Chair, which is a position that Nasdaq does not maintain.¹⁰ In addition, the Exchange proposed to eliminate the PBOT Governor position and replace it with a new Designated Independent Governor position.¹¹ The Exchange's current Certificate of Incorporation specifies that the Board shall be composed of "[a] number of Designated Independent Governors, which, together with the Member Governor and the PBOT Governor, shall equal at least 20% of the total number of Governors...."¹² Because the Exchange proposed to replace the PBOT Governor position with a new Designated Independent Governor, which position, like all other "Designated" Governor positions, would be selected pursuant to a process that involves member input, the proposal does not change the composition of the Board with respect to the minimum percentage of Governors that would be selected pursuant to member input.¹³

Finally, the Exchange proposed to modify the process for filing vacancies on the Board to reflect the newly proposed structure. Among other things, in the event of a vacancy, the

¹⁰ The function of the Vice Chair was to preside over meetings of the Board in the absence of the Chair. See Phlx By-Law Sec. 28-12.

¹¹ With the acquisition of the Exchange by The NASDAQ OMX GROUP, Inc., the Philadelphia Board of Trade, Inc ("PBOT") (n/k/a NASDAQ OMX Futures Exchange, Inc.) became a subsidiary of the parent holding company. Accordingly, the Exchange determined that it was no longer appropriate to provide for this special representation on the Board. See Notice, supra note 3, at 74 FR 11157.

¹² See the Exchange's Certificate of Incorporation, Article Sixth.

¹³ The election of the Designated Governors is conducted pursuant to the Exchange's Trust Agreement under which an independent trustee exercises voting authority with respect to the one outstanding share of Series A Preferred Stock, which share has the exclusive right to elect and remove such Governors. The Series A Preferred Stock is voted by the trustee, pursuant to the Trust Agreement, as directed by Phlx members in accordance with the Exchange's governing documents.

appropriate nominating committee would nominate, and the Board would appoint, a replacement Governor. For example, in the event of a vacancy in the Member Governor position, the new Member Nominating Committee would nominate a replacement.

Accordingly, the proposed changes will more closely align Phlx's governance structure to that of Nasdaq, which, like the Exchange, is a subsidiary of NASDAQ OMX GROUP, Inc. At the same time, the proposed changes will continue to assure the fair representation of the Exchange's members in the selection of the Exchange's directors and administration of its affairs.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-Phlx-2009-17) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Florence E. Harmon
Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(12).