

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-62783; File No. SR-Phlx-2010-104)

August 27, 2010

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Conversion of NASDAQ OMX PHLX, Inc. to a Limited Liability Company

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 16, 2010, NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. 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 convert NASDAQ OMX PHLX, Inc. from a Delaware corporation to a Delaware limited liability company (a "Delaware LLC"). This proposal is solely a technical rule change. There are no new regulatory issues implicated in this proposal. Further, the Exchange is not proposing any material changes, but rather only amendments to make technical conforming changes to the formation documents to correspond with the LLC conversion. All substantive provisions that govern an exchange are consistent with the Act and remain intact. The Exchange's proposed formation documents, including the Certificate of Formation, Limited Liability Agreement and By-Laws, are consistent in form and scope with the most recent governing documents that were approved by the Commission.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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, on the Commission's website at <http://www.sec.gov>, 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 convert NASDAQ OMX PHLX, Inc. from a Delaware corporation to a Delaware LLC. The NASDAQ OMX Group, Inc. acquired NASDAQ OMX PHLX, Inc. (formerly the Philadelphia Stock Exchange, Inc.) on July 24, 2008³. At this time, The NASDAQ OMX Group, Inc. proposes to convert NASDAQ OMX PHLX, Inc., a Delaware corporation to NASDAQ OMX PHLX LLC, a Delaware limited liability company (the "LLC"), to more closely conform its organizational structure to that of other NASDAQ OMX entities. Pursuant to the Delaware Limited Liability Company Act, as amended from time to time (the "LLC Act"), the LLC will continue the existence of NASDAQ

³ See Securities Exchange Act Release Nos. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR-Phlx-2008-31); and 58183 (July 17, 2008), 73 FR 42850 (July 23, 2008) (SR-NASDAQ-2008-035).

OMX PHLX, Inc. and all rights, privileges, powers, property and liabilities shall vest in the LLC at the time of conversion. As such, this proposed rule change will merely effect a change in entity form of the Exchange and have no substantive effect on the current rights and obligations of the current members and owners of the Exchange.⁴

Following the conversion, the Exchange proposes to be governed by a Certificate of Formation, the LLC Agreement and the By-Laws of the LLC (the "LLC By-Laws") in accordance with the LLC Act. These proposed formation documents reflect all of the current rights and obligations of the members and owners of the Exchange in the appropriate form of governing documents of a Delaware LLC. The specific changes to the current documents are discussed in the following sections.

Certificate of Formation

In order to convert from a Delaware corporation to a Delaware LLC, a Certificate of Conversion and a Certificate of Formation of the LLC will be filed with the Secretary of State of the State of Delaware. The Certificate of Conversion is necessary to effect the conversion of the Exchange from a Delaware corporation to a Delaware LLC pursuant to the LLC Act. Further, the LLC Act requires that a Certificate of Formation of the LLC be filed to accomplish the formation of the LLC. Unlike a Certificate of Incorporation which contains actual governing provisions, a Certificate of Formation only sets forth three pieces of information, the name of the company, the address of the registered office and the name and address of the registered agent.

As such, only the information in the FIRST and SECOND provisions of the Certificate of

⁴ Additionally, the proposed limited liability company agreement of the Exchange (the "LLC Agreement") post-conversion is consistent in form and scope with the Second Amended and Restated Limited Liability Company Agreement of The Nasdaq Stock Market LLC, dated as of July 9, 2009 (the "NSM LLC Agreement"). See Securities Exchange Act Release No. 34-53128 (Jan. 13, 2006), 71 FR 3550 (January 23, 2006), (approval of Nasdaq's application for registration as a national securities exchange).

Incorporation are reflected in the Certificate of Formation with certain minor changes. First, a Delaware LLC must contain the words "LLC" in its name. In light of this requirement, the name set forth in the FIRST provision of the Certificate of Formation of the LLC reflects the proposed name "NASDAQ OMX PHLX LLC" rather than "NASDAQ OMX PHLX, Inc." Additionally, the LLC is referred to as a "limited liability company" in this provision rather than a "corporation."

The governing provisions of a Delaware LLC need to be set forth in the limited liability company agreement of such Delaware LLC. As such, the remaining provisions of the Certificate of Incorporation are proposed to be reflected in the LLC Agreement and the LLC By-Laws, as together, these documents are considered the limited liability company agreement of the LLC for purposes of the LLC Act (the "Agreement").⁵

Limited Liability Company Agreement

Following the conversion of the Exchange, it is proposed that the Exchange adopt the Agreement. As noted above, the Agreement will consist of the LLC Agreement and the LLC By-Laws. The LLC By-Laws proposed to be adopted are in substantially the same form as the By-Laws currently in effect, with certain modifications as further explained below.

The LLC Agreement proposed by the Exchange is similar to that of the NSM LLC Agreement. Schedule A of the LLC describes the proposed ownership of the limited liability company interests (designated therein as "shares" of the LLC), which ownership structure is identical to that currently in place. The NASDAQ OMX Group, Inc. ("NASDAQ OMX Group")

⁵ The LLC Act requires a limited liability company agreement in order for an entity to be duly formed (see Section 18-201(d) of the LLC Act). Additionally, a limited liability company agreement is defined in Section 18-101(7) as an agreement that governs the affairs of the LLC. Both the LLC By-Laws and the LLC Agreement together constitute the limited liability company agreement for purposes of the LLC Act.

is the sole common shareholder of NASDAQ OMX PHLX, Inc. and is proposed to become a member of the Exchange (within the meaning of the LLC Act) and the sole owner of all of the Common Stock (as defined in the LLC Agreement) of the LLC. There is also the PHLX Member Voting Trust (the "Trust") which holds the one (1) Series A Preferred Stock of NASDAQ OMX PHLX, Inc. The Trust is proposed to become a member of the Exchange (within the meaning of the LLC Act)⁶ and the owner of the one (1) Series A Preferred Stock (as defined in the LLC Agreement) in the LLC.

The Exchange is incorporating the current By-Laws of NASDAQ OMX PHLX, Inc. into the LLC Agreement as Exhibit A to that LLC Agreement. The Exchange proposes to make minimal conforming amendments to the current By-Laws to comport with the conversion to an LLC. Specifically, the Exchange proposes to create an introductory paragraph to the By-Laws to explain that the By-Laws together with the LLC Agreement constitute the LLC Agreement within the meaning of the LLC Act.⁷

Discussion of the proposed LLC Agreement

As mentioned above, the Exchange proposes to adopt an LLC Agreement as part of its conversion to a Delaware LLC. Such LLC Agreement will contain many provisions set forth in the Certificate of Incorporation of the Exchange, with such modifications as are necessary to reflect the new entity form. NASDAQ OMX Group and the Trust, the current common and preferred stockholders of the Exchange, respectively, would each be admitted to, and become a member of, the LLC. As a member of the LLC, each such person will hold limited liability

⁶ Neither NASDAQ OMX Group nor the Trust is a member organization of the Exchange within the meaning of the By-Laws.

⁷ See 6 Del. C. § 18-101(7).

company interests in the LLC, denoted in the LLC Agreement as Common Stock and Preferred Stock.⁸

The proposed LLC Agreement begins with an introductory paragraph identifying the parties to the LLC Agreement and certain recitals. Such recitals set forth the conversion process generally, including (i) the applicable Delaware law⁹ by which the conversion is effected, (ii) the conversion of all of the shares of the capital stock of the NASDAQ OMX PHLX, Inc. into limited liability company interests of the LLC (designated therein as Common Stock and Preferred Stock), (iv) the admission of NASDAQ OMX Group and the PHLX Trust to the LLC as members thereof, and (v) the ownership structure post-conversion. As provided for in the LLC Agreement, NASDAQ OMX Group and the Trust will hold Common Stock and Preferred Stock, respectively, in the LLC, with the same rights and obligations as such entities had under the Certificate of Incorporation and the By-Laws immediately prior to the conversion. With respect to the other sections of the LLC Agreement, the changes from or additions to the existing organizational documents of the Exchange are discussed below by Section.

Section 1 of the LLC Agreement, titled "Name; Conversion", specifies the name of the entity in addition to other information with respect to the conversion process. As discussed above, the name of the Exchange, "NASDAQ OMX PHLX, Inc.", set forth in provision FIRST of the Certificate of Incorporation, is proposed to be changed to "NASDAQ OMX PHLX LLC" as required by the LLC Act. Section 1 of the LLC Agreement also notes that the organization documents, namely the Certificate of Formation and LLC Agreement with attachments,

⁸ Interests in a Delaware LLC are referred to as limited liability company interests under the LLC Act rather than stock or shares. However, these interests can be referred to by whatever term the limited liability company agreement provides. The LLC Agreement defines such interests as Common Stock and Preferred Stock.

⁹ NASDAQ OMX PHLX would be converted pursuant to Section 18-214 of the Delaware LLC Act (6 Del. C. § 18-101, et seq.).

supersede the former organizational documents, in this case the Certificate of Incorporation and the By-Laws of NASDAQ OMX PHLX, Inc. Further Section 1 of the LLC Agreement reiterates the conversion of all of the shares of the capital stock of the Exchange and the admission of the members of the LLC as generally set forth in the recitals of the LLC Agreement. The LLC Act provision which provides for the continued existence of the Exchange as a Delaware LLC is noted in the last sentence of this Section as well. This sentence, while not identical to, is similar in nature to the perpetual existence of the Exchange set forth in provision FIFTH of the Certificate of Incorporation in that it recognizes the continuation of the Exchange without a set term. This language was used in lieu of the language of provision FIFTH of the Certificate of Incorporation as it derives from the LLC Act and is more appropriate to the proposed new entity form of the Exchange. Identical language can be found in Section 6 of the NSM LLC Agreement.

Section 2 of the LLC Agreement, titled Principal Business Office, lists the principal business office of the Exchange and provides notice of such information to those reviewing the LLC Agreement. Such provision is standard in limited liability company agreements of Delaware LLCs¹⁰ and such addition will have no material substantive effect on the current operations or governance of the Exchange.

Section 3 of the LLC Agreement, titled Registered Office; Registered Agent, lists the Exchange's registered office and registered agent, which was formerly reflected in provision SECOND of the Certificate of Incorporation. The entity acting as the registered agent and the place of the registered office will remain unchanged post-conversion.

¹⁰ For example, see Section 2 of the NSM LLC Agreement.

Section 4 of the LLC Agreement, titled Members, sets out the name and mailing address of each Stockholder, providing notice of such information to those reviewing the LLC Agreement. Such provision is standard in limited liability company agreements of Delaware LLCs¹¹ and such addition will have no material substantive effect on the current operations or governance of the Exchange.

Section 5 of the LLC Agreement, titled Certificates, refers to the filing of Certificate of Formation and the Certificate of Conversion of the LLC. Such provision acknowledges and confirms that such filings, which were necessary for the conversion to be effected, were authorized by the LLC. This Section additionally sets forth those person(s) who have the authority to file any other certificates with the Delaware Secretary of State on behalf of the LLC pursuant to the LLC Act. This provision has no analog under the existing organizational documents of the Exchange but given its administrative nature, such change will have no material substantive effect on the current operations of the Exchange.

Section 6 of the LLC Agreement, titled Purpose, discusses the Exchange's business purpose. This provision is virtually identical to provision THIRD of the Certificate of Incorporation with the following modifications: (i) this Section references a limited liability company instead of a corporation to reflect the appropriate entity form of the Exchange post-conversion, and (ii) this section also includes standard language to clarify that not only can the LLC engage in the general purpose set forth therein but it can also engage in those activities necessary or incidental to such purpose. This clarifying language is common in limited liability company agreements of Delaware LLCs¹² and such addition will have no material substantive effect on the current operations or governance of the Exchange.

¹¹ For example, see Section 3 and 4 of the NSM LLC Agreement.

¹² For example, see Section 7 of the NSM LLC Agreement.

Section 7 of the LLC Agreement, titled Powers, discusses the general powers of the Exchange, the Board of Governors and the Officers and largely defers to the applicable provisions set forth in the LLC By-Laws. The LLC By-Laws at Article IV, Section 4-4 delineate in more detail the powers of the Board of Governors which are referred to in Section 7 of the LLC Agreement. Similarly, the LLC By-Laws delineate in more detail the powers of the Officers of the Exchange in Article V. Article IV, Section 4-4 and Article V of the LLC By-Laws are identical to the corresponding provisions in the current By-Laws of the Exchange.

Section 8 of the LLC Agreement, titled Management, sets forth the general management structure of the Exchange. It is proposed that the management structure of the LLC be the same as currently in effect under the governing documents of NASDAQ OMX PHLX, Inc. As proposed, the management would remain vested with the Board of Governors, the general powers, composition and removal of which are set forth in Section 8 of the LLC Agreement. Such provision is substantially identical to that of provision SIXTH of the Certificate of Incorporation.¹³ Certain additions have been made to the language retained from provision SIXTH of the Certificate of Incorporation, including (i) a provision referencing the applicable provisions of the By-Laws and their incorporation into the LLC Agreement in order to acknowledge the inter-relationship of these two documents in the governance of the LLC, (iii) a sentence denoting each Governor as a "manager" of the LLC for purposes of the LLC Act¹⁴, and

¹³ The introductory paragraph of provision SIXTH of the Certificate of Incorporation is reflected in Section 8(a) and (b) of the LLC Agreement. Subsection (a) of provision SIXTH of the Certificate of Incorporation is reflected in Section 8(c) of the LLC Agreement. Subsection (b) of provision SIXTH of the Certificate of Incorporation is reflected in Section 8(f) of the LLC Agreement.

¹⁴ As the term "Governor" is not a term used in the LLC Act, to ensure that provisions of the LLC Act that relate to "managers" of a Delaware LLC (i.e. those Persons who manage a Delaware LLC), the Governors have been denoted as such solely for this purpose.

(iv) a provision acknowledging that the Governors are agents of the LLC in performing their duties as prescribed by the Agreement. Each such addition represents standard language typically contained in limited liability company agreements of Delaware LLCs¹⁵ and such additions will have no material substantive effect on the current operations or governance of the Exchange

Section 9 of the LLC Agreement, titled Officers, discusses generally the officers of the LLC and their appointment, role as agent and duties but defaults to the By-Laws for a more detailed description of such topics. The applicable provisions of the LLC By-Laws are in Article V and remain identical to the description provided in Article V of the By-Laws currently in effect.

Section 10 of the LLC Agreement, titled Limited Liability, corresponds, in part, with provision FIFTEENTH of the Certificate of Incorporation and Article IV, Section 4-18 of the current By-Laws in that it limits the personal liability of Governors for the debts and obligations of the Exchange. The Exchange also proposes to include, in Section 10 of the LLC Agreement, standard language, which is consistent with, and reflective of, the limitation on liability of members provided for in the LLC Act, to limit the personal liability of the Stockholders for the debts and obligations of the Exchange. Similar language is contained in the NSM LLC Agreement in Section 11 therein.

Sections 11 through 14 of the LLC Agreement are equity-related provisions which encompass the topics of capital contributions, additional capital contributions, allocations of profits and losses and distributions. These provisions set forth the basic economic arrangement of the Stockholders and remain consistent with the economic arrangement under the current

¹⁵ For example, see Section 9(a), (c) and (j) of the NSM LLC Agreement.

corporate documents. For example, NASDAQ OMX Group, as the sole common shareholder, is generally entitled to all dividends declared by the Exchange. As the sole economic member of the LLC, NASDAQ OMX Group is entitled to all distributions made by the LLC. Profits and losses will also be allocated to NASDAQ OMX Group. This is a slight change from the current allocation structure, which allocates such profits and losses to the Exchange rather than directly to its stockholders. However, the LLC is a disregarded entity for tax purposes unlike a corporation, and as such profits and losses need to be allocated to the appropriate members of the LLC. The Trust does not share in such allocation as it has no economic rights associated with the Series A Preferred Stock it holds.¹⁶ Additionally, these Sections of the LLC Agreement require that NASDAQ OMX Group's contributions be noted in the books and records of the LLC and that no member shall be required to make any additional capital contribution to the LLC without its consent and the consent of the Board of Governors. These provisions are virtually identical to provisions 12 through 15 of the NSM LLC Agreement, and given their administrative nature shall have no material substantive effect on the operations of the Exchange. Section 14(b) also incorporates the language of Article FOURTEENTH of the Certificate of Incorporation, relating to distributions to foreign currency options participants, with certain modifications necessary in light of distribution limitations contained in the LLC Act. For example, the entire provision, which discusses certain distributions to foreign currency option participants, is "subject to" the LLC Act to ensure that the mandatory limitations on distributions contained in Sections 18-607 and 18-804 of the LLC Act will be respected in contemplating any distribution under Section 14(b) of the LLC Agreement to the extent such provisions would be

¹⁶ Currently, pursuant to the Certificate of Incorporation at provision FOURTH at (b), the Series A Preferred is entitled to no dividends and a de minimis amount in a liquidation preference. The Series A Preferred Shareholder retains these rights in the LLC Agreement at Section 16 (c)(iii).

applicable to such distributions.

The first sentence of Section 15 of the LLC Agreement, titled Books and Records, is reflective of Article TWELFTH of the Certificate of Incorporation. Section 15 of the LLC Agreement also sets forth certain additional information relating to general administrative matters with respect to the books and records of the LLC including that (i) the Board of Governors will keep and maintain complete books and records of the LLC, (ii) the Stockholders have the right to inspect such books and records, and (iii) the Board of Governors has the right to select method by which the books will be kept and the public accounting firm who will provide any independent audit of such books and records. Given the general administrative nature of such additions, none of these additions shall have any material substantive effect on the manner in which the Exchange is governed by the Board of Governors or the general operations of the Exchange.¹⁷

Section 16 of the LLC Agreement, titled Limited Liability Company Interests, sets forth the classes of limited liability company interests, denoted as shares, of the LLC and the rights and obligations of each class. The language pertaining to the authorized shares, classes, rights and obligations of the Stockholders contained in this section is virtually identical to the language contained in provision FOURTH of the Certificate of Incorporation, which relates to the current shares and classes of the Exchange. There has been no material change to any of the rights and obligations of the Stockholders. A sentence has been added to allow for the Exchange to issue additional interests or securities in the Exchange upon approval by the Board of Governors.¹⁸

¹⁷ A virtually identical provision is set forth in Section 16 of the NSM LLC Agreement.

¹⁸ Specifically, the last sentence of Section 16(a) of the LLC Agreement would state: “The Exchange may issue or establish such other interests in the Exchange or such other Exchange securities as the Board determines in accordance with this Agreement and the By-Laws.” With respect to this proposed sentence, the Exchange notes that if it decided

This gives the Exchange versatility in issuing the various "interests" to the members utilizing the Exchange, which are otherwise not contemplated generally in the LLC context. Any such "interests" would be limited in the manner prescribed by the Board of Governors. Also, this Section includes language tracing the conversion of the corporate shares held by the Stockholders into shares of the LLC. Finally, the term "dividend" has been changed to "distribution" as, under the LLC Act, a Delaware LLC makes distributions whereas a Delaware corporation would declare a dividend. This change does not affect the underlying right of the Stockholder to such property; it is merely a change in terminology. The information contained in Section 16 of the LLC Agreement is also set forth in Article XXIX, Section 29-4 of the LLC By-Laws. The definition for "Designated Independent Governors" contained in provision FOURTH of the Certificate of Incorporation is not defined in Section 16, as the definition of this term is already set forth in in [sic] Article I of the By-Laws of the LLC. Such definition, other than updating the reference to the applicable governing documents, remains unchanged post-conversion.

Section 17 of the LLC Agreement, titled Other Business, is standard language in the limited liability company context and merely states that the Stockholders may engage in other business other than their interest in the LLC and that the LLC has no rights to such other business or the proceeds derived therefrom. This concept is consistent with that of a stockholder of a corporation in that a stockholder, generally, has no obligation to present opportunities to the corporation or turn over proceeds derived from other ventures of the stockholder. A similar

to issue or establish such other interests in the Exchange or other Exchange securities, the Exchange would take the necessary corporate actions and would seek the necessary approvals to do so. See Email from Angela S. Dunn, Assistant General Counsel, Phlx, to Richard Holley, Assistant Director, Division of Trading and Markets, Commission, dated August 25, 2010.

provision is contained in Section 18 of the NSM LLC Agreement.

Section 18 of the LLC Agreement, titled Exculpation and Indemnification, provides for the exculpation and the indemnification of the Stockholders and related persons. The inclusion of such a provision in the limited liability context is not uncommon as it reflects the fact that Stockholders, under the LLC Act, can act on behalf of the LLC to the extent authorized under the LLC Agreement and the LLC By-Laws. As such, it is proposed to provide the same level of exculpation and indemnification for such persons as is given to the Board of Governors to the extent such persons are authorized to act on behalf of the LLC. As such, the same standard of conduct applicable to the Board of Governors under Article SIXTEENTH of the Certificate of Incorporation is proposed to be used in Section 18 of the LLC Agreement. Articles FIFTEENTH and SIXTEENTH of the Certificate of Incorporation, relating to the exculpation and indemnification of the Board of Governors, have been set forth in Article IV, Sections 4-18(g) and 4-18(h) of the LLC By-Laws.

Section 19 of the LLC Agreement is merely a general statement that any transfer of an interest in the LLC must be made in accordance with the By-Laws and the LLC Agreement. The LLC Agreement addresses transfers in Section 16 thereof. Such section provides certain conditions to the transfer of the outstanding Common Stock and Preferred Stock and, as noted previously, such conditions are virtually identical to those conditions currently contained in provision FOURTH of the Certificate of Incorporation. Additionally, Article XXIX, Section 29-4 of the LLC By-Laws also addresses the transfer of shares in the Exchange. With minor modifications addressing limited liability company specific issues, Article XXIX, Section 29-4 of the LLC By-Laws remains identical to Article XXIX, Section 29-4 of the By-Laws currently

in effect.¹⁹

Section 21 of the LLC Agreement sets forth the events which will cause the dissolution of the LLC, as prescribed by mandatory provisions of the LLC Act or as otherwise agreed among the parties. A similar provision is contained in Section 21 of the NSM LLC Agreement.

Sections 22 through 26 and 28 of the LLC Agreement are general provisions which are relatively standard in limited liability company agreements of Delaware LLCs.²⁰ These provisions include: a benefits of agreement clause, a severability clause, a binding agreement clause, an entire agreement clause, a governing law clause and a notice provision. We note that the Trustee, Members and Member Organizations are acknowledged as holding rights under the Agreement and included as third-party beneficiaries to the LLC Agreement as is similarly provided in the NSM LLC Agreement.

Section 27 of the LLC Agreement contains the necessary vote under which the LLC Agreement may be amended. Under the Certificate of Incorporation, the Board of Governors had the right to amend the By-Laws currently in effect. Such By-Laws provide for amendment in the manner prescribed in Article XXII, Section 22-1. This same amendment vote has been set forth in Section 27 of the LLC Agreement so that the authority of the Board of Governors to amend will remain unchanged following the conversion.

The provisions in the Certificate of Incorporation have been incorporated into the Certificate of Formation, LLC Agreement and By-Laws as indicated herein but for provisions FIFTH and TENTH. The language used in provision FIFTH of the Certificate of Incorporation was not incorporated verbatim into the LLC Agreement; however, as noted previously, the

¹⁹ Section 20 of the LLC Agreement is intentionally omitted and may be used at a future date. The Exchange would file a proposed rule change with the Commission if it intended to amend this provision.

²⁰ For example, see Sections 22 through 26, and 28 of the NSM LLC Agreement.

general concept of this provision is reflected in the last sentence of Section 5 of the LLC Agreement. Additionally, provision TENTH of the Certificate of Incorporation was not carried over to the proposed Agreement because such provision is not consistent with applicable Delaware law in the limited liability company context.

III. Proposed By-Laws of the LLC

As noted above, the Exchange proposes to adopt the By-Laws of NASDAQ OMX PHLX, Inc. as the LLC By-Laws with the changes noted below.

It is proposed to incorporate certain global changes to the By-Laws currently in effect including (i) referencing the Certificate of Formation of the LLC, the LLC By-Laws and/or the LLC Agreement, as applicable, instead of the Certificate of Incorporation as such documents will replace and supersede the Certificate of Incorporation and existing By-Laws, (ii) deleting references to the DGCL (including the definition thereof) throughout the By-Laws as such law will no longer be applicable to the Exchange post-conversion and substituting in lieu thereof the phrase "applicable law," and (iii) updating all references to "NASDAQ OMX PHLX, Inc." to "NASDAQ OMX PHLX LLC" consistent with the name change associated with the conversion.

Specifically, in Article I, titled Definitions, the Exchange proposes to delete the reference to Section 1-1 Definitions. The Exchange proposes to reference the LLC By-Laws, the LLC Agreement and the Trust Agreement in the definition for both Designated Governors and Designated Independent Governor, in lieu of the reference to provision FOURTH of the Certificate of Incorporation, which will no longer be effective post-conversion. None of these changes will have a material substantive effect but are merely reflective of the proposed change in applicable governing documents.

Further, the Exchange proposes to include in the text associated with the term "Member" a sentence that such term as used in the LLC By-Laws is distinct from the usage of member within the meaning of the LLC Agreement and the LLC Act.²¹ Again this change has no material substantive effect but merely reflects that the term "member" is a term of art under the LLC Act, with rights and obligations associated with it that are distinct from how the term "Member" is used in the LLC By-Laws. The Exchange also proposes to amend the text in the term "Demutualized [sic] Merger" to be historically accurate in that NASDAQ OMX PHLX, Inc. was a party to such transaction rather than the LLC, which was not in existence on the date of such merger.

The term "Stockholder" is proposed to be modified to reflect that NASDAQ OMX Group and the Trust are no longer stockholders of a corporation but members of a Delaware LLC. Such change does not have material substantive effect but is merely a conforming change to the new entity form of the Exchange. The rights and obligations of these persons remain unchanged following the conversion, only the terminology is proposed to be revised. Such definition is consistent with the meaning given to such term in the LLC Agreement.

The Exchange proposes to define "NASDAQ OMX Conversion" to refer to the conversion proposed and described herein from the Delaware corporation, "NASDAQ OMX PHLX, Inc." to the Delaware LLC, "NASDAQ OMX PHLX LLC." The Exchange proposes to eliminate references to the Merger Subsidiary²² and replace those references with language referencing the conversion to an LLC.

²¹ The meaning of "Member" as set forth in the LLC By-Laws is not proposed to change.

²² This language was added to the By-Laws at the time of the merger between a wholly owned subsidiary of NASDAQ OMX Group and the Philadelphia Stock Exchange, Inc. See Securities Exchange Act Release Nos. 58179 (July 17, 2008), 73 FR 42874 (July 23,

The Exchange proposes to amend Article III, titled Member and Member Organization Nominations – Member and Member Organization Annual Elections – Member and Member Organization Meetings, to remove references to the Certificate of Incorporation and instead reference the By-Laws, as the By-Laws, following the conversion, will be the appropriate governing document.

Section 3-3 of Article III, titled Removal of Designated Governors, is proposed to refer to a special meeting in the first sentence thereof in lieu of the current reference to an annual meeting. The reference to an "annual" meeting is inconsistent with the remainder of the first sentence in Section 3-3. Such sentence discusses a meeting called in accordance with Section 3-2(e). Section 3-2(e) sets forth the procedure to call a "special" meeting not an "annual" meeting. As such, the correct meeting reference is to a "special" meeting not an "annual" meeting. The Exchange proposes to make this change so that the sentence consistent throughout. This proposal does not amend the composition of the Board of Governors.

The Exchange proposes to amend Article IV, titled Board of Governors, to remove references to the Merger and Merger Subsidiary and instead reference the Conversion. Section 4-18 of Article IV of the LLC By-Laws, titled Indemnification, is proposed to reflect the relevant indemnification standard provided in provision FIFTEENTH of the Certificate of Incorporation pertaining to the indemnification of Governors. It is proposed to include in Section 4-21 of Article IV of the LLC By-Laws clarifying language regarding the necessary purpose behind a books and records inspection request. Such language is consistent with and provided by the LLC Act.

2008) (SR-Phlx-2008-31); and 58183 (July 17, 2008), 73 FR 42850 (July 23, 2008) (SR-NASDAQ-2008-035).

The Exchange proposes to add a Section 4-24 to Article IV of the LLC By-Laws. This provision, entitled "Interested Transactions" is substantially identical to the language used in provision ELEVENTH of the Certificate of Incorporation and ensures that the guidelines relating to the types of transactions described therein are retained following the conversion of the Exchange.

The Exchange proposes to remove the reference to "corporate" in each instance where the phrase "corporate seal" is used in Article V of the current By-Laws, specifically Section 5-8. The term "corporate" is not applicable to the Exchange post-conversion.

The Exchange proposes certain changes to Article VIII, titled Presiding Officials of the Exchange, Article X, titled Standing Committees, Article XII, titled Permits-Eligibility-Election-Initiation Fee, Article XV, titled Transfer of Foreign Currency Options Participations, Article XVII, titled Insolvency-Suspension-Reinstatement, and Article XVIII, titled Offenses, Discipline, Penalties and Business Connections [sic], to add clarifying language, correct minor inconsistencies and remove extraneous language within these sections. These changes have no material substantive effect on the above noted provisions or the operations of the Exchange but are merely clerical in nature.

The Exchange proposes to make certain clerical changes to Article XV, titled Transfer of Foreign Currency Options Participations. These changes are not substantive in nature and merely reflect a reorganization of the existing provisions. Specifically, the terms ordering Section 15-3 (e.g. "First") have been deleted as such terms are redundant in light of the phrase "in the following order of seniority" contained in Section 15-3(a). Additionally, the sub-sections of Section 15-3(a)(iii) have been given a letter ordering designation. Finally, the sub-section of Section 15-3 entitled "Balance of Proceeds" has been moved to follow the last paragraph relating

to the priority of payments in order to have such sub-section be in the appropriate payment priority. Such sub-section was not otherwise modified.

The Exchange proposes to incorporate additional language to the transfer provision contained in Article XXIX, Section 29-4(b) to address Delaware LLC-specific issues. The existing conditions to transfers previously set forth in Section 29-4(b) remain unchanged. Rather, the additional language in the first sentence of Section 29-4(b) merely adds a new requirement to the effectiveness of a transfer. Under the proposed Section 29-4(b), a written instrument in which the transferee agrees to be bound by the LLC Agreement must be delivered along with the other instruments noted in Section 29-4(b) prior to a transfer being effective. This will ensure that any transferee is aware of, and bound by, all relevant governing provisions. Additionally, two sentences have been added to this subsection in order to address the admission of any transferee who complies with this Section to the LLC. Unlike a stockholder in the corporation, a transferee needs to be admitted to the LLC before it can obtain the rights of a member thereof. This is an additional formality in the limited liability company context that needs to be provided for; however, the provision for admission contained in Section 29-4(b) does not effect a material substantive change on the transfer provision as a whole but is merely reflective of a nuance specific to the limited liability company form. To the extent that a transferee complies with Section 29-4, the additional language provides that they will automatically be admitted to the LLC.

IV. Other Provisions of the Certificate of Incorporation

There are two other Articles of the Certificate of Incorporation of NASDAQ OMX PHLX, Inc. which are reflected in the By-Laws of the Exchange. Article SEVENTH is set forth in By-Law Article XXVIII, Section 28-13 and titled Action Without a Meeting. Also, Article

EIGHTH of the Certificate of Incorporation is set forth in By-Law Article XXVIII, Section 28-1 and titled Place of Stockholder Meetings. The LLC Agreement and attached By-Laws provide the Board the ability to amend documents as set forth in By-Law Article XXII, Section 22-1, Amendments to By-Laws as well as Section 27 of the LLC Agreement.

The Exchange intends for this proposal to be operative upon filing with the State of Delaware.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act²³ in general, and furthers the objectives of Section 6(b)(5) of the Act²⁴ 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, by streamlining all subsidiary self-regulatory organizations of NASDAQ OMX Group to conform the corporate documents and provide clarity to its members. The proposed amendments will not impact the rights of members or the sole shareholder, both of which will continue to be entitled to all rights and privileges that exist under the governing documents of NASDAQ OMX PHLX, Inc.²⁵

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.

²³ 15 U.S.C. 78f(b).

²⁴ 15 U.S.C. 78f(b)(5).

²⁵ “The conversion of any entity into a domestic limited liability company shall not be deemed to affect any obligations or liabilities of the other entity prior to its conversion to a domestic limited liability company...” See 6 Del. C. § 18-214(e).

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A)(ii) of the Act²⁶ and Rule 19b-4(f)(6)²⁷ thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)²⁸ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),²⁹ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.³⁰ The Exchange represents that the proposal “does not impact either the members of NASDAQ OMX PHLX, Inc. or the public” and only

²⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁷ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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. The Exchange has satisfied this requirement.

²⁸ 17 CFR 240.19b-4(f)(6).

²⁹ 17 CFR 240.19b-4(f)(6)(iii).

³⁰ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

“impacts the administrative functions of the Exchange.”³¹ Additionally, the Commission notes that the Exchange represents that the proposed Certificate of Formation, LLC Agreement, and By-Laws reflect all of the current rights and obligations of the members and owners of the Exchange, and that the proposed LLC Agreement is consistent in form and scope with the limited liability company agreement of another self-regulatory organization previously approved by the Commission.³² Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change to be operative on September 1, 2010.

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.

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-2010-104 on the subject line.

Paper comments:

³¹ See SR-PHLX-2010-104 at Item 7.

³² See supra note 4 and accompanying text, and discussion in Section II.A.1.

- 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-2010-104. 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 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-2010-104 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.³³

Florence E. Harmon
Deputy Secretary

³³ 17 CFR 200.30-3(a)(12).