

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58613; File No. SR-Phlx-2008-65)

September 22, 2008

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Administration and Enforcement of Certain Rules Pertaining to XLE

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934<sup>1</sup>, and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on September 5, 2008, 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, 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, pursuant to Section 19(b)(1) of the Act<sup>3</sup> and Rule 19b-4 thereunder,<sup>4</sup> proposes to change the administration and enforcement of certain rules in light of the fact that the Exchange will cease operation of the technology used to operate XLE<sup>®</sup>,<sup>5</sup> the Exchange’s equity trading system, on or before October 24, 2008 (the “Shutdown”). At this time, the Exchange is not proposing to amend the text of any rules, but simply to change the administration and enforcement of certain rules, as described below. The Shutdown will not affect any other trading systems or markets at Phlx.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(1).

<sup>4</sup> 17 CFR 240.19b-4.

<sup>5</sup> See Securities Exchange Act Release No. 54538 (September 28, 2006), 71 FR 59184 (October 6, 2006) (SR-Phlx-2006-43) (Order approving XLE<sup>®</sup>).

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 change the administration and enforcement of certain rules in light of the Shutdown. A more in-depth rule review may occur in the future; this proposal is intended to cover the specific rules that make trading available on XLE, which will no longer be the case after the Shutdown.

Background

The Exchange began XLE<sup>®</sup> in 2006. The Exchange has continued to operate XLE<sup>®</sup> through the July 2008 acquisition<sup>6</sup> of the Exchange by the NASDAQ OMX Group, Inc. ("NASDAQ") and up to the present time. Following a review of the operations of the Exchange, including XLE<sup>®</sup> and the fact that it currently accounts for less than one-tenth of one percent of national share volume in equity securities, it was determined to cease operation of the technology used to operate XLE<sup>®</sup>.

The Shutdown

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<sup>6</sup> See Securities Exchange Act Release No. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008).

The Exchange informed XLE Participants<sup>7</sup> on August 4, 2008, that the Exchange intends to discontinue XLE<sup>®</sup> on or before October 24, 2008.<sup>8</sup> As XLE Participants discontinue their operations on XLE<sup>®</sup> and disconnect from the system, they will not be permitted to re-connect. Depending on the rate of disconnections, the Exchange may determine to implement the Shutdown before October 24, 2008. In that event, the Exchange would notify any remaining XLE Participants at least 14 calendar days prior to the Shutdown.

#### Current XLE Rules

Today, XLE<sup>®</sup> is available for the acceptance of orders from XLE Participants and the execution of those orders.<sup>9</sup> On the day of the Shutdown and thereafter, XLE<sup>®</sup> would no longer be available to accept orders and would not be available to execute any transactions. Any executions that took place before the Shutdown would clear and settle normally, even if such settlement was scheduled to take place after the Shutdown.

Further, the Exchange's optional outbound router, facilitated through PRO Securities LLC ("PRO"),<sup>10</sup> will cease to accept and route orders on the day of the Shutdown because PRO will no longer receive any instructions to route orders to other

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<sup>7</sup> See Phlx Rule 1(nn).

<sup>8</sup> At that time, XLE Participants were given information about applying for membership in the NASDAQ Stock Market as a means to continue their equity trading operations, if they so desired. XLE Participants are free to apply for membership at any trading venue. Nothing in this proposed rule change is intended to restrict their access at any other venue.

<sup>9</sup> See Phlx Rules 181 and 185.

<sup>10</sup> See Phlx Rule 185(g). The function of PRO as the Exchange's optional outbound routing facility is more fully described in Section IV.D. of the SR-Phlx-2006-43 approval order. See supra note 5.

trading centers from XLE<sup>®</sup>. PRO was deemed to be a facility<sup>11</sup> of the Exchange because of its function as the provider of these outbound router services. Following the Shutdown, PRO would no longer act in its capacity as an outbound router for the Exchange; therefore, the Exchange would no longer administer PRO as its facility.

Finally, the Exchange currently allows member organization that are XLE Participants and the members associated with them to register as Market Makers<sup>12</sup> and Market Maker Authorized Trader (“MMATs”)<sup>13</sup>, respectively.<sup>14</sup> After the Shutdown, the Exchange will cancel the registrations of any Market Makers and MMATs that remain on XLE<sup>®15</sup> and such persons will cease to have the obligations associated with Market Makers and MMATs<sup>16</sup> because after the Shutdown, there will be no venue for the Market Makers and MMATs to perform their functions. In addition, after the Shutdown, no further registrations for Market Makers or MMATs will be accepted because there will be no venue for Market Makers and MMATs to perform their functions.

To the extent that these rules state that orders “will” be accepted and registrations will be permitted, for example, that will not occur after the Shutdown. The trading rules applicable to XLE will continue to be in effect respecting trades that occurred before the Shutdown and remain in the Exchange’s rulebook for ease of reference.

## 2. Statutory Basis

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<sup>11</sup> 15 U.S.C. 78c(a)(2).

<sup>12</sup> See Phlx Rule 1(l).

<sup>13</sup> See Phlx Rule 1(m).

<sup>14</sup> See Phlx Rule 170(a), 171(b) and 172(a).

<sup>15</sup> At this time, only one Market Maker, that has one MMAT, is registered in three securities on XLE<sup>®</sup>.

<sup>16</sup> See Phlx Rules 171 and 173.

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>17</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>18</sup> 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 providing notice of the Exchange's policy regarding the administration and enforcement of certain Phlx Rules in light of the Shutdown.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

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

No written comments were either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and paragraph (f)(1) of Rule 19b-4 thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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.

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<sup>17</sup> 15 U.S.C. 78f(b).

<sup>18</sup> 15 U.S.C. 78f(b)(5).

The Exchange designates the proposed rule change as constituting a stated policy, practice, or interpretation with respect, to the meaning, administration, or enforcement of an existing rule. Specifically, as described above, the Exchange has stated its policy regarding how it will administer and enforce the enumerated portions of Phlx Rules 170-174, 181 and 185 regarding XLE<sup>®</sup>, Market Makers, MMATs and PRO in light of the Shutdown.

#### 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](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2008-65 on the subject line.

##### Paper Comments:

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

All submissions should refer to File Number SR-Phlx-2008-65. 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 the 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-2008-65 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.<sup>19</sup>

Florence E. Harmon  
Acting Secretary

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<sup>19</sup> 17 CFR 200.30-3(a)(12).