

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59697; File No. SR-Phlx-2009-23)

April 2, 2009

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing of a Proposed Rule Change and Amendment No. 1 Thereto to Amend the By-Laws, Rules and Option Floor Procedure Advices of NASDAQ OMX PHLX, Inc.

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 March 13, 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 the Exchange. On March 25, 2009, Phlx filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, 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, Rules of the Board of Governors and Options Rules (the two sets of rules are together known as the “Rules”), and Option Floor Procedure Advices (“OFPAs” or “Advices”)³ to make changes to certain standing committees and processes of the Exchange. Specifically, the Exchange proposes to eliminate: (a) the Admissions Committee; (b) the Options Allocation, Evaluation and Securities Committee; (c) the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ OFPAs are discussed in Rule 970, which sets forth the criteria for the imposition of a fine (not to exceed \$ 5,000) on any member, member organization, or any partner, officer, director or person employed by or associated with any member or member organization, for any violation of an OFPA, which violation the Exchange determined is minor in nature (known as the “Minor Rule Plan”). Such a fine would be imposed in lieu of commencing a “disciplinary proceeding” as that term is used in Exchange Rules 960.1-960.12, and would be subject to Rule 19d-1 under the Act.

Options Committee; (d) the Foreign Currency Options Committee; and (e) the Weekly Bulletin. Additionally, the Exchange proposes to: (a) make the Finance Committee optional; (b) change the structure of the Business Conduct Committee and eliminate reference to the Hearing Officer; and (c) authorize action in the event of an emergency or extraordinary market conditions.⁴

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/>, 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 Exchange was recently acquired by The NASDAQ OMX Group, Inc. ("NASDAQ OMX").⁵

⁴ Certain changes proposed in the present filing may be affected by SR-Phlx-2009-17, which is pending. See Securities Exchange Act Release No. 59538 (March 9, 2009), 74 FR 11152 (March 16, 2009). We would amend the present filing if necessary upon approval of SR-Phlx-2009-17.

⁵ On July 24, 2008, NASDAQ OMX acquired all of the common stock of the Exchange, which became a wholly-owned subsidiary of NASDAQ OMX. The Exchange has continued to operate as a separate self-regulatory organization ("SRO"). See Securities Exchange Act Release No. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR-Phlx-2008-31). See also Securities Exchange Act Release No. 58183 (July 17, 2008), 73

The purpose of the proposed rule change is to streamline the governance of the Exchange by eliminating and/or consolidating certain standing committees of the Board to make the Exchange's governance process more similar to that of NASDAQ OMX's other U.S. SROs, The NASDAQ Stock Market LLC (the "NASDAQ Stock Market") and NASDAQ OMX BX, Inc. ("BX"). The duties of the eliminated committees will generally be administered by Exchange staff or other Board committees. The Exchange also proposes to codify the ability of the Exchange to take emergency action, change how information is provided to Exchange membership, and update the functioning of the Exchange's disciplinary committee.

The Exchange proposes to: eliminate the Admissions Committee and Allocation, Evaluation and Securities Committee; consolidate the Options Committee and the Foreign Currency Options Committee into the Quality of Markets Committee; and eliminate the use of the Weekly Bulletin. The Exchange also proposes to: change the membership structure of the Business Conduct Committee and eliminate the Hearing Officer; make the Finance Committee optional at the discretion of the Board; and authorize the Chief Executive Officer and the President of the Exchange to take action in the event of an emergency or extraordinary market conditions. As a result of this filing, eleven standing committees of the Exchange's Board would be reduced to seven, one of which would be optional at the discretion of the Board.⁶

The Exchange believes that its proposal should considerably streamline Exchange governance to the benefit of the Exchange and its membership. Moreover, the Exchange

FR 42850 (July 23, 2008) (SR-NASDAQ-2008-035). The Exchange recently changed its name to NASDAQ OMX PHLX. See Securities Exchange Act Release No. 58380 (August 18, 2008), 73 FR 49728 (August 22, 2008) (SR-Phlx-2008-61).

⁶ The following Exchange Committees would remain after this filing: Executive; Audit; Business Conduct; Compensation; Nominating, Elections and Governance; Quality of Markets; and Finance (optional). But see Securities Exchange Act Release No. 59538 (March 9, 2009) (SR-Phlx-2009-17), which discusses, among other things, renaming of the Nominating, Elections and Governance Committee.

believes that its proposal is conducive to the objective of Phlx, BX, and the NASDAQ Stock Market having similar by-laws and/or rules where practical.

Admissions Committee

The Exchange proposes to amend its By-Law Article X, Section 10-1, Standing Committees, which lists all Exchange standing committees, to eliminate the Admissions Committee. The Exchange proposes to delete its By-Law Article X, Section 10-6, Admissions Committee, which sets forth the duties and functions of the Admissions Committee,⁷ and transfer those duties to the Exchange's Membership Department in proposed new Rule 900.1, General Powers and Duties of Membership Department. The Exchange proposes to delete By-Law Article XII, Section 12-5, Application, which sets forth the duties and functions of the Admissions Committee in respect of applications for permits and admission as foreign currency options ("FCO") participants,⁸ and transfer the relevant provisions of Section 12-5 to the Membership Department in new Rule 900.2, Membership Applications.

Over the years, Exchange staff has been involved in virtually all aspects of the Exchange's admission and membership process, including assisting the Admissions Committee in the review of membership applications, renewals and requests for contraction and expansion

⁷ Pursuant to By-Law Article X, Section 10-6, the Admissions Committee has jurisdiction over, among other things: the review of applications of non-members seeking to become members, member organizations, permit holders, foreign currency options participants, or foreign currency options participant organizations; changes to membership affiliation and status; determinations regarding affiliations of existing members and member organization firms and determinations regarding inactive nominees [sic]; and qualification, revocation and reinstatement of permits and foreign currency options participations.

⁸ By-Law Article XII, Section 12-5 describes the processing of applications for permits or admission as FCO participants and indicates, among other things, that: Exchange staff (the Membership Services Department) initially receives, reviews and makes recommendations regarding such applications; the Admissions Committee makes the final application determinations; and applicant names are posted for a period of seven days in the Weekly Bulletin and on the website of the Exchange.

of membership privileges, and communicating with the Admissions Committee and Phlx membership regarding admission and membership. The Exchange believes that staff time allocated to communicating with the Admissions Committee, organizing its meetings, and communicating on its behalf can be better utilized and redirected to performance of admission and membership-related functions by the new Membership Department, which is currently known as the Membership Services Department. The Exchange therefore proposes to have the Membership Department perform the functions of the Admissions Committee.

The Exchange proposes to expressly provide that the Membership Department will administer the Exchange rules that are currently administered by the Admissions Committee.⁹ The Exchange also proposes to delete all references to the Admissions Committee, clarify references to the Membership Department, and generally make changes in a variety of by-laws and rules that correspond to by-law amendments discussed herein.¹⁰

Proposed new Rule 900.1, which is based on deleted By-Law Article X, Section 10-6, indicates that the Membership Department will be in charge of the membership and admissions processes at the Exchange. As such, the Membership Department will have jurisdiction over, among other things, admission, denial, reinstatement, and revocation of membership to the Exchange; supervision of members, membership organizations and partnership arrangements;

⁹ See Rule 900 (indicating that the Membership Department will administer Rules 901 to 949 and 971 and 972, inclusive).

¹⁰ “Membership Department” in By-Law Article I, Section 1-1(mm) replaces the Exchange’s Membership Services Department. See also By-Law Article I, Section 1-1, Article IV, Section 4-4, Article V, Section 5-8, Article XI, Section 11-1, Article XIII, Sections 13-2, 13-6, 13-8, Article XIV, Section 14-5, Article XV, Sections 15-1, 15-2, 15-3, 15-6, 15-7, 15-8, 15-10 Article XVII, Sections 17-1, 17-2, 17-3, 17-4, 17-5, and Article XXVII, Section 27-4; and Rules 1, 173, 600, 601, 602, 901, 902, 904, 906, 907, 909, 921, 922, 930, 949, and 1090.

qualification, registration, and determinations regarding affiliations of entities as foreign currency options participants; and rights and privileges of permit holders.¹¹

Proposed new Rule 900.2, which is based on deleted By-Law Article XII, Section 12-5, indicates that applicants for a permit or admission as a member or as a foreign currency options participant shall initiate the procedure by filing an application with the Membership Department in such form as prescribed by the department. All applications will be reviewed and acted on by the Membership Department. Should the Membership Department not approve an application, it shall notify the applicant in writing of the specific grounds for denial.¹²

An applicant that is not approved has a right to an appeal hearing pursuant to By-Law Article XI. The process of appealing from standing committee decisions is set forth in By-Law Article XI, Section 11-1(a), which indicates that appeals from standing committee decisions are initiated by filing with the Secretary of the Exchange a notice of appeal within 10 days after the decision has been rendered. The Exchange proposes to add the Membership Department into By-Law Article XI, Section 11-1(a) to permit appeals from Membership Department decisions. The Exchange proposes to similarly add the Membership Department into By-Law Article XI, Section 11-1(c) to indicate that appeals from decisions of the Membership Department will be

¹¹ The Exchange proposes to transfer from By-Law Article X, Section 10-6 to new Rule 900.1 only those substantive areas that are relevant to the structure of the admissions and membership process overseen by the Membership Department. For example, the provision in Section 10-6 that the Business Conduct Committee share jurisdiction over the revocation of permits and foreign currency options participations in connection with disciplinary matters with the Admissions Committee, and references to the Admissions Committee are not transferred to Rule 900.1.

¹² The Exchange proposes to transfer from deleted By-law Article XII, Section 12-5 to new Rule 900.2 only those substantive areas that are relevant to the processing of applications. Provisions in Section 12-5 regarding posting of applicant names for a seven day period in the Weekly Bulletin and on the Exchange's website; references to the Admissions Committee; and references to the Demutualization Merger, *see* Securities Exchange Act Release No. 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR-Phlx-2003-73), for example, are not transferred to Rule 900.2.

heard by a special committee of the Board composed of three Governors, at least one of whom is an Independent Governor (the “Special Committee”). A decision of the Special Committee is not appealable to the Board.

The Exchange believes that the elimination of the Admissions Committee and transfer of its duties to the Membership Department will begin to align Exchange admissions and membership processing more closely to that of NASDAQ OMX and/or the NASDAQ Stock Market.¹³

Weekly Bulletin

The Exchange proposes to eliminate publication of its Weekly Bulletin (the “Bulletin”), which contains, among other things, changes in permit holder and member organization status and applications made to the Exchange.¹⁴ The Bulletin invites readers to report information regarding applications and applicants. The current admissions process requires that, if the Admissions Committee votes favorably regarding a request by an applicant, his or her name has to be posted for a period of 7 days in the Bulletin and on the Exchange’s website. If during this

¹³ The NASDAQ Stock Market does not have an Admissions Committee. See NASDAQ Stock Market By-Law (“NASDAQ By-Law”) Article III, Sections 5 and 6. Membership application processing and decisions regarding NASDAQ membership are handled by staff. See NASDAQ Stock Market Rule (“NASDAQ Rule”) 1000 et seq.

¹⁴ The Bulletin, which is currently distributed in electronic form, also provides notice of certain matters such as, for example, the bid, ask and last sales prices for Exchange memberships and NASDAQ OMX Futures Exchange, Inc. (“NFX”) (formerly Philadelphia Board of Trade or “PBOT”) shares; and disciplinary decisions issued and sanctions imposed by the Exchange’s Business Conduct Committee. See Supplementary Material to By-Law Article XVIII, Section 18-2 for Board policy of publicizing fines, censures and disciplinary actions regarding members and member organizations. The Exchange intends to provide this information on its website.

time an objection to provision of a permit or application is received by the Admissions Committee (the “objection process”), it must reconsider its favorable vote.¹⁵

The Exchange believes that admission and membership decisions can be administered by the Exchange. The Exchange therefore proposes to eliminate the objection process and notification in the Bulletin and/or on its website. The Exchange intends to instead provide notification regarding membership approvals on the Exchange’s website.

The Exchange believes that the Bulletin, which at one time served as a predominant means of communication regarding exchange matters, is no longer a viable means of communication in today’s fast-paced, electronic world. As such, the Exchange proposes to terminate publication of the Bulletin and to provide disciplinary and other relevant information on its website.

Allocation Committee

The Exchange proposes to amend its By-Law Article X, Section 10-1, Standing Committees, to eliminate the Options Allocation, Evaluation and Securities Committee (the “Allocation Committee”). The Exchange proposes to delete its By-Law X, Section 10-7, Options Allocation, Evaluation and Securities Committee, which sets forth the duties and functions of the Allocation Committee.¹⁶ The relevant functions and duties of the committee will be performed by Exchange staff.

¹⁵ See By-Law Article XII, Section 12-5. See also By-Law Article XV, Section 15-1 regarding a 7 day notice in the Bulletin; and By-Law Article XVII, Section 17-5 regarding a 14 day notice in the Bulletin prior to the Admission Committee considering an application. See also By-Law Article XV, Section 15-2 regarding a 7 day transfer notice.

¹⁶ Pursuant to By-Law Article X, Section 10-7, the Allocation Committee has jurisdiction over, among other things: the appointment or approval of specialists, Streaming Quote Traders (“SQTs”) and Remote Streaming Quote Traders (“RSQTs”); allocation, retention and transfer of privileges to deal in options on Exchange trading floors; evaluation of the

Similarly to Exchange staff involvement with the admission and membership process, Exchange staff has been involved in all aspects of the Exchange's allocation process through its work with the Allocation Committee. The time allocated by Exchange staff to communicating with and on behalf of the Allocation Committee and organizing its meetings can be better utilized and redirected to performance of allocation-related functions upon elimination of the Allocation Committee.¹⁷ In addition, the allocation process often necessitates a fast turnaround, such that calling committee meetings, particularly during trading hours, is often challenging. Thus, the Exchange believes that allowing Exchange staff to perform the functions of the Allocation Committee should significantly improve the flow and efficiency of the allocation process.

With the elimination of the Allocation Committee, the Exchange proposes to expressly state that the Exchange will administer the rules that are currently administered by the Allocation Committee.¹⁸ The Exchange also proposes to delete all references to the Allocation Committee, clarify references to the Exchange or its staff, and generally make changes in a variety of by-laws, rules, and OFPAs that correspond to by-law amendments discussed herein.¹⁹

performance of specialists, SQTs and RSQTs; and administration of the 500 series of Exchange rules.

¹⁷ The Exchange's Equity Allocation, Evaluation and Securities Committee was eliminated with the implementation of the Exchange's electronic equity trading system (XLE). See Securities Exchange Act Release No. 54329 (August 17, 2006), 71 FR 50482(August 25, 2006) (SR-Phlx-2006-43). XLE is no longer operating.

¹⁸ See Rule 500 (indicating that Rules 500 through 599 will be administered by the Exchange). Unlike the transfer of duties from the Admissions Committee to a specific Membership Department, the transfer of duties from the Allocation Committee is generally to the "Exchange." In addition to the rules, the admission process is described by the Exchange on its website.

¹⁹ See By-Law Article XI, Section 11-1 and By-Law Article XXVII, Sections 27-3 and 27-4 [sic]; Rules 501, 505, 506, 507, 508, 510, 511, 513, 515, 602, and 1014; and OFPA B-6.

The Exchange believes that the elimination of the Allocation Committee and transfer of its duties to the Exchange should help make the Exchange's allocations structure more similar to that of the NASDAQ Stock Market.²⁰

Options Committee and Foreign Currency Options Committee

The Exchange is eliminating the Options Committee and Foreign Currency Options Committee (the "FCO Committee"), which are now two separate Board committees, and combining them into the Quality of Markets Committee. In particular, the Exchange proposes to amend its By-Law Article X, Section 10-1, Standing Committees to eliminate the Options Committee and the FCO Committee from the list of Exchange committees. The Exchange proposes to delete its By-Law Article X, Section 10-20, Options Committee, and its By-Law Article X, Section 10-17, Foreign Currency Options Committee, setting forth the duties and functions of the committees.²¹ The Exchange then proposes to fold these two committees into the Quality of Markets Committee (the "QMC") by amending the language of By-Law Article X, Section 10-21, Quality of Markets Committee, so that the duties and functions of the Exchange's

See also Rules 525 and 526 (deleting rules regarding Allocation Committee authority), and 509 (deleting rule referring to outdated subcommittee of the Allocation Committee).

²⁰ The NASDAQ Stock Market does not currently have a Board committee similar to the Allocation Committee. See NASDAQ Stock Market By-Law Article III, Sections 5 and 6.

²¹ Pursuant to By-Law Article X, Section 10-20, the Options Committee currently has jurisdiction to, among other things: supervise the dealings of members and market makers on the options trading floor; recommend adoption of such rules as it deems necessary for the convenient and orderly transaction of business upon the equity and index options trading floor; enforce rules and regulations relating to order, decorum, health, safety and welfare on the equity and index options trading floor; and resolve trading disputes on the equity and index options trading floor. Pursuant to Article X, Section 10-17, the FCO Committee has analogous powers and duties in respect of the FCO trading floor. The Exchange notes that pursuant to Rule 124, trading disputes are now settled by Options Exchange Officials ("OEOs"). See Securities Exchange Act Release No. 55877 (June 7, 2007), 72 FR 32937 (June 14, 2007) (SR-Phlx-2006-87). OEOs are defined in Rule 1(pp).

QMC would be analogous to those of the NASDAQ Stock Market QMC.²² Specifically, the new QMC would have the following functions respecting index, foreign currency, and equity options as well as equities:²³ to provide advice and guidance to the Board on issues relating to the fairness, integrity, efficiency, and competitiveness of the information, order handling, and execution mechanisms of the Exchange from the perspective of investors (both individual and institutional), retail firms, specialist and registered options trader firms, and other participants of the Exchange; and to advise the Board with respect to national market system plans and linkages between the facilities of the Exchange and other markets.

The new QMC would include broad representation of various participant groups in the Exchange, including investors, specialist and registered options trader (“ROT”) firms, retail firms, and order entry firms. Specifically, the QMC would include a number of Member Representative members²⁴ that is equal to at least 20 percent of the total number of members of the committee. Furthermore, the number of Non-Industry members (i.e. committee members not associated with broker-dealers)²⁵ on the QMC would equal the sum of the number of Industry

²² See NASDAQ Stock Market By-Law Article III, Section 6(c).

²³ Equities do not currently trade on the Exchange.

²⁴ “Member Representative member” is defined as a member of any committee appointed by the Board of Governors who has been elected or appointed after having been nominated pursuant to these By-Laws. The definition of “Member Representative member” is also proposed to be modified in SR-Phlx-2009-17. See proposed By-Law Article I, Section 1-1(qq), which is based on NASDAQ Stock Market By-Law Article I(r).

²⁵ “Non-Industry member” is defined as 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 Exchange; or (iii) any other individual who would not be an Industry member. See proposed By-Law Article I, Section 1-1(oo), which is based on NASDAQ Stock Market By-Law Article I(w). “Public Member” is defined as 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. See proposed By-Law Article I, Section 1-1(pp) [sic], which is based on NASDAQ Stock

members²⁶ and Member Representative members. The Exchange believes that the proposed composition of the QMC would reflect a “fair representation” of Exchange members.²⁷

By-Law Article VIII, Section 8-1 currently states that the Chairs of the Options Committee and the FCO Committee preside over the Exchange’s options and FCO trading floors. The Exchange proposes to amend its By-Law Article VIII, Section 8-1 to eliminate reference to the Chairs of the Options Committee and FCO Committee and to indicate that the President of the Exchange and his designee would be vested with supervision over the options

Market By-Law Article I(z). The definitions of “Non-Industry member” and “Public Member” are also proposed to be modified in SR-Phlx-2009-17.

²⁶ “Industry member” is defined as a member of any committee appointed by the Board 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 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. The definition of “Industry member” is also proposed to be modified in SR-Phlx-2009-17. See proposed By-Law Article I, Section 1-1(nn), which is based on NASDAQ Stock Market By-Law Article I(m).

²⁷ See Section 6(b)(3) of the Act setting forth, among other things, the objective of “fair representation” of an exchange’s members in the administration of its affairs. 15 U.S.C. 78f(b)(3).

trading floor.²⁸ In particular, updated Article VIII, Section 8-1 would indicate that the President of the Exchange and his designated staff shall have: general supervision over the options trading floor as well as general supervision of the dealings of members on the trading floor and on Exchange trading systems, and of the premises of the Exchange immediately adjacent thereto; supervision of all connections or means of communications with the options trading floor; and supervision over the location of equipment and the assignment and use of space on the options trading floor. Section 8-1 would also indicate that the President shall have supervision over relations with other options exchanges; and that the Exchange shall make and enforce rules and regulations relating to order, decorum, health, safety and welfare on the options trading floor and the immediately adjacent premises of the Exchange and shall be empowered to impose penalties for violations thereof. The Exchange believes that vesting this authority with the President of the Exchange is appropriate, should streamline Exchange processes, and is similar to the NASDAQ Stock Market.²⁹

As with other eliminated committees, the Exchange proposes to delete all references to the Options Committee and the FCO Committee, clarify references to the Exchange or its staff, and generally make changes in a variety of by-laws, rules, and OFPAs that correspond to the proposed by-law amendments.³⁰

²⁸ By-Law Article VIII, Section 8-1 also refers to XLE, which was the Exchange's electronic system for the entry, display, execution, and reporting of orders in NMS stocks. XLE was discontinued on October 24, 2008, and is no longer operating. See Securities Exchange Act Release No. 58613 (September 22, 2008), 73 FR 57181 (October 1, 2008) (SR-Phlx-2008-65). References to XLE will be removed from By-Law Article VIII, Section 8-1; Article I, Section 1-1; and Article X, Sections 10-11 and 10-15.

²⁹ See NASDAQ Stock Market By-Law Article IV, Section 5 (vesting general supervision of the operations of the NASDAQ Stock Market in the President).

³⁰ See By-Law Article XXVII, Section 27-3; Rules 60, 101, 124, 508, 606, 1012, 1014, 1017, 1061, 1064, 1066, 1079, and 1080; and OFPAs A-12, A-13, A-14, B-6, F-27, F-28, and F-31.

Business Conduct Committee

The Business Conduct Committee (“BCC”) is the Exchange’s disciplinary committee. It has exclusive jurisdiction to, among other things: monitor compliance with the Act and rules and regulations thereunder, with the Exchange’s By-Laws and Rules and any interpretations thereof, and with the rules, regulations and policies of the Board or any Exchange committees; and authorize the initiation of any disciplinary actions or proceedings brought by the Exchange.³¹ The BCC currently consists of nine members that include: three Independent Governors; one member or person associated with a member organization who conducts business on XLE; one member who conducts options business at the Exchange; and four persons who are members or persons associated with a member organization. The Exchange proposes to change the required number of members on BCC and the qualifications for committee membership.

The Exchange proposes to change By-Law Article X, Section 10-11 to give the Board discretion to establish not less than five or more than nine members of BCC.³² The Exchange also proposes that the BCC would be populated from three distinct groups. The majority of the committee members would be Non-Industry members and the remaining committee members would be Industry members. Significantly, to further ensure fair representation of Exchange

³¹ See By-Law Article X, Section 10-11. Because the functions and duties of BCC are clearly set forth in Section 10-11, the Exchange proposes to delete Rule 700, Powers and Duties, which the Exchange believes superfluously lists the rules administered by BCC.

³² In By-Law-Article X, Section 10-11, the Exchange also adds a cross-reference to By-Law Article VIII, Section 8-1.

members on this important committee,³³ at least one committee member would have to be a member of the Exchange that conducts an options business at Phlx.³⁴

The Exchange also proposes to update certain provisions in its disciplinary procedures in furtherance of conforming its hearings processes with those of the NASDAQ Stock Market.³⁵ Specifically, the Exchange is changing the composition of its disciplinary Hearing Panel by deleting the requirement to have a Hearing Officer. Currently, Exchange disciplinary hearings on a Statement of Charges³⁶ are held before a three person Hearing Panel appointed by the Chair of the BCC and the presiding person of each Hearing Panel is a Hearing Officer. The Exchange is eliminating the Hearing Officer position. The Exchange proposes to change its By-Law Article X, Section 10-11 to delete references to a Hearing Officer.

The Exchange proposes to change various rules in the 960 series to delete references to the Hearing Officer, and to clarify references to the Hearing Panel.³⁷ The Exchange also proposes to add the definition of a Hearing Attorney in Rule 960.5 to indicate that, among other things, the Hearing Attorney will take over the administrative duties that the Hearing Officer previously handled, will advise the Hearing Panel on applicable rules and procedure, but will not

³³ See Section 6(b)(3) of the Act setting forth, among other things, the objective of “fair representation” of an Exchange’s members in the administration of its affairs. 15 U.S.C. 78f(b)(3).

³⁴ The Exchange is deleting the requirement to have one BCC member that is an Exchange member or is associated with a member organization that conducts equity business on XLE, as XLE is no longer operating. See supra note 17.

The Commission notes that Phlx has committed to submit a separate proposed rule change further modifying Phlx By-Law Article X, Section 10-11 to clarify that the BCC shall include a number of committee members equal to at least 20% of the total number of members on the BCC that are representative of Phlx members.

³⁵ See Rules 960.1 to 960.12 (Exchange disciplinary hearing rules) and NASDAQ Stock Market Rules 4800 to 4816 (NASDAQ Stock Market delisting hearing rules).

³⁶ See Rules 960.2 and 960.3.

³⁷ See Rules 960.4, 960.5, 960.6, 960.8, 960.9, 960.10, 960.11, and 970.

be a voting member of the Hearing Panel.³⁸ The process of appealing from Hearing panel decisions will remain the same.³⁹

The Exchange additionally proposes rule changes to update and conform certain disciplinary rules. To that end, the Exchange proposes amendments that would: update references to the Exchange's Regulatory Department in Rule 960.2; add the ability to serve documents by electronic delivery upon mutual consent of the parties in Rule 960.11; and clarify that Hearing Panelists may be paid additional compensation in extraordinary cases in Rule 960.5.

The Exchange believes that allowing the Board to reduce the number of members on BCC by as much as 44% should make the committee more efficient. The Exchange also believes that requiring that the BCC be composed of Non-Industry members and Industry members that are defined similarly by the Exchange and the NASDAQ Stock Market, and introducing a Hearing Attorney position in lieu of a Hearing Officer, should make the Exchange and NASDAQ Stock Market hearing processes more similar while maximizing the fairness and independence of the Exchange's BCC and disciplinary proceedings.

³⁸ Proposed subsection (a)(4) of Rule 960.5 states: A Hearing Attorney shall assist the Hearing Panel in the discharge of its duties. The Hearing Attorney shall not have a vote in the Panel's disposition of the matter, but will advise the Panel on the application of the Disciplinary Rules, Guidelines for Sanctions, and relevant precedent. The Hearing Attorney will not be permitted to be involved in any manner in the investigation of possible misconduct, to participate in the consideration by the Business Conduct Committee of whether to institute a disciplinary action, to render a decision following a hearing without the concurrence of a majority of the Hearing Panel, rule upon requests to disqualify the Hearing Attorney or any member of the Hearing Panel, or issue citations for violations of Exchange rules or floor procedure advices.

³⁹ Appeals may be initiated by filing with the Exchange a written notice of appeal within 10 days after a decision is rendered, and will be conducted by the Board or an Advisory Committee appointed by the Board. See By-Law Article XI, Sections 11-1, 11-2, and 11-3. The Exchange proposes to delete reference to "Hearing Officer" in the title of By-Law Article XI, Section 11-3.

Finance Committee

Currently, the Finance Committee is a permanent standing committee of the Board.⁴⁰

The Exchange proposes to amend its By-Law Article X, Section 10-1 to indicate that the Finance Committee would be an optional committee, to be appointed only if deemed necessary by the Board, and that the Finance Committee would have such powers and duties with respect to the financial operation of the Exchange as may be delegated by the Board. The Exchange proposes to amend its By-Law Article X, Section 10-15 to make corresponding changes indicating the optional nature of the Finance Committee. Should a Finance Committee not be appointed by the Board, however, pursuant to By-Law Article IV, the Board continues to retain the power to review the Exchange's finances.⁴¹

The Exchange's proposal to make the Finance Committee optional is similar to the NASDAQ Stock Market, where the Finance Committee is optional, at the discretion of the Board.⁴²

Emergency or Extraordinary Market Conditions

The Exchange proposes adoption of new By-Law Article IV, Section 4-23, which is similar to NASDAQ Stock Market By-Law Article IX, Section 5 authorizing the Board or its designee to take certain actions in the event of an emergency or extraordinary market conditions.

Specifically, new By-Law IV, Section 4-23 states that in the event of an emergency or

⁴⁰ The Finance Committee has the jurisdiction to, among other things, report to the Board regarding: examination of the accounts and vouchers of the Exchange; prepare estimates of the income and recommendations as to appropriations for expenses, and assist in the preparation of the annual budget and make recommendations thereon. See By-Law Article X, Section 10-15.

⁴¹ See By-Law Article IV, Section 4-4.

⁴² See NASDAQ Stock Market By-Law Article III, Section 5(b) (Board may appoint a Finance Committee to advise regarding financial operations and conditions of NASDAQ Stock Market).

extraordinary market conditions, the Board or such person as may be designated by the Board, shall have the authority to take any action regarding: the trading in or operation of the Exchange or any other organized securities markets that may be operated by the Exchange, the operation of any automated system owned or operated by the Exchange, and the participation in any such system or any or all persons or the trading therein of any or all securities; and the operation of any or all offices or systems of members and member organizations, if, in the opinion of the Board or its designee, such action is necessary or appropriate for the protection of investors or the public interest or for the orderly operation of the marketplace or the system. Although the Exchange has other “extraordinary market conditions” provisions in its rules,⁴³ the Exchange seeks adoptions of a provision that is similar to the NASDAQ Stock Market.

Finally, the Exchange is proposing technical, housekeeping rule changes in respect of references that are obsolete, no longer in use, or in need of updating so that Phlx Rules and Advices may be conformed. These include references to departments, positions, and committees that are renamed or no longer exist (e.g. Market Surveillance Department, Market Surveillance, Arbitration Department, Financial Automation, Office of Chief Examiner, and Stock List Committee); and to circulars that are no longer in use (e.g. exchange and information circulars).⁴⁴

2. Statutory Basis

The Exchange proposes to streamline the governance structure of the Exchange by updating, eliminating and consolidating its committees, codifying certain emergency functions,

⁴³ See e.g. Rules 1080(e) and 98.

⁴⁴ See Rules 100, 108, 124, 507, 761, 800, 803, 960.2, 1001, 1003, 1014, 1017, 1039, 1042, 1047, 1061, 1080, 1092, and 1001A; and OFPAs A-12, A-13, A-14, F-7, F-13, F-15, F-22, and F-27. As an example, the terms “Market Surveillance Department” in Rule 761 and “Market Surveillance” in Rule 1047 are changed to “regulatory staff.”

updating its disciplinary process, and harmonizing Exchange By-Laws, Rules and OFPAs. The Exchange believes that its proposal is consistent with Section 6(b) of the Act⁴⁵ in general, and furthers the objectives of Section 6(b)(5) of the Act⁴⁶ 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. The Exchange believes that its proposal also furthers the objectives of Section 6(b)(3) of the Act,⁴⁷ in that it is designed to promote fair representation of the members of the Exchange in the administration of its affairs, as discussed herein.

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.

⁴⁵ 15 U.S.C. 78f(b).

⁴⁶ 15 U.S.C. 78f(b)(5).

⁴⁷ 15 U.S.C. 78f(b)(3).

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-2009-23 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-2009-23. 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 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 publicly available. All submissions should refer to File Number SR-Phlx-2009-23 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.⁴⁸

Florence E. Harmon
Deputy Secretary

⁴⁸ 17 CFR 200.30-3(a)(12).