

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-65201; File No. SR-Phlx-2011-90)

August 25, 2011

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Approving Proposed Rule Change Relating to Board of Director Qualifications

I. Introduction

On June 30, 2011, NASDAQ OMX PHLX LLC (“Phlx” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change relating to the qualifications of its Board of Directors (“Board”). The proposed rule change was published for comment in the Federal Register on July 14, 2011.³ The Commission received no comment letters regarding the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to amend its By-Laws to revise the qualifications for any position on the Board required to be representative of issuers. Currently, Section 3-2 of the Exchange By-Laws provides: “[T]he number of Non-Industry Directors, including at least one Public Director⁴ and at least one issuer representative (or if the Board consists of ten or more Directors, at least two issuer representatives), shall equal or exceed the sum of the number of Industry Directors⁵ and Member Representative Directors⁶ to be elected under the terms of the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 64845 (July 8, 2011), 76 FR 41549 (July 14, 2011) (“Notice”).

⁴ A Public Director is “a Director who has no material business relationship with a broker or dealer, the Exchange or its affiliates, or FINRA.” See Exchange By-Law Article I(gg).

⁵ An Industry Director is “a Director (excluding any two officers of the Exchange, selected at the sole discretion of the Board, amongst those officers who may be serving as

LLC Agreement.”⁷ The Exchange recently adopted this provision when it conformed its By-Laws to those of NASDAQ.⁸ According to the Exchange, however, it does not have a significant number of original listings as does NASDAQ,⁹ and therefore has less available issuer representatives to serve on the Board. Consequently, the Exchange now proposes to change the requirement by broadening it to require a director representative of issuers and investors instead of a director that is representative only of issuers. The Exchange believes that the expansion of

Directors (the ‘Staff Directors’)), 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 Director or 20 percent or more of the gross revenues received by the Director’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 Director or member or 20 percent or more of the gross revenues received by the Director’s or 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.” See Exchange By-Law Article I(p).

⁶ A Member Representative Director is “a Director who has been elected or appointed after having been nominated by the Member Nominating Committee or by a Member pursuant to [the] By-Laws. A Member Representative Director may, but is not required to be, an officer, director, employee, or agent of a Member. See Exchange By-Law Article I(w).

⁷ The Exchange recently adopted this provision to its By-Laws. See Securities Exchange Act Release No. 64338 (April 25, 2011), 76 FR 24069 (April 29, 2011) (SR-Phlx-2011-13) (conforming some of the Exchange By-Laws to the By-Laws of The NASDAQ Stock Market LLC (“NASDAQ”).

⁸ See id.

⁹ See Notice, supra note 3, 76 FR at 41550 n.9.

the director position from one that is representative of issuers to one that is representative of issuers and investors is more appropriate for Phlx.¹⁰ The nomination and election process for such directors would remain the same. The director representative of issuers and investors would be nominated by the Nominating Committee and elected by the sole shareholder, The NASDAQ OMX Group, Inc.¹¹

The Exchange also proposes to eliminate the requirement that there be at least two of these director positions representative of issuers if the Board consists of ten or more directors. In its proposal, the Exchange notes that Section 6(b)(3) of the Act¹² only requires that one Director representative represents issuers and investors.¹³

III. Discussion

After careful review of the proposal, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁴ In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,¹⁵ which requires, among other things, that the rules of an exchange be 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 Commission further

¹⁰

Id.

¹¹

See Exchange By-Law Article V, Section 5-3 and Article II, Section 2-1.

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15 U.S.C. 78f(b)(3).

¹³

See Notice, supra note 3, 76 FR at 41550.

¹⁴

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

¹⁵

15 U.S.C. 78f(b)(5).

finds that the proposal is consistent with Section 6(b)(3) of the Act,¹⁶ which requires that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer.

The Commission believes that the proposed expansion from an issuer representative to a representative of issuers and investors, and elimination of the requirement that the Board have two such representatives if the Board consists of ten or more directors are consistent with the Act. The fair representation requirement in Section 6(b)(3) of the Act¹⁷ is intended to give members a voice in the selection of an exchange's directors and the administration of its affairs. The Commission notes that this change tracks the statutory language included in Section 6(b)(3) of the Act,¹⁸ which requires one or more directors to be "representative of issuers and investors." The Commission also notes that the elimination of the requirement to have at least two director positions representative of issuers if the Board consists of ten or more directors is consistent with Section 6(b)(3) of the Act,¹⁹ which only requires the Board to have one such representative. Further, the proposed rule change is consistent with the Act in that it is designed to ensure that the Board continues to satisfy compositional requirements, particularly those concerning fair representation. The Exchange will continue to require the Board composition to include the requisite Public Directors, Industry Directors, and Member Representative Directors (the latter will continue to constitute twenty percent of the Board). In addition, the proposed change will not impact the procedures to nominate and elect any director to the Board that are currently in

¹⁶ 15 U.S.C. 78f(b)(3).

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

place. Accordingly, the Commission finds that Phlx's revised By-Laws, as proposed, will continue to provide board qualification requirements that are consistent with the Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁰ that the proposed rule change (SR-Phlx-2011-90) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Elizabeth M. Murphy
Secretary

²⁰ 15 U.S.C. 78s(b)(2).

²¹ 17 CFR 200.30-3(a)(12).