

196. Robert Mabe, Registered Representative, dated April 18, 2009 ("Mabe")
197. John R. Still, dated April 20, 2009 ("Still")
198. David Farrell, dated April 20, 2009 ("Farrell")
199. Daniel Woodring, V.P. and Chief Compliance Officer, PFS Investments Inc., dated April 20, 2009 ("PFS")
200. James Rice, Registered Principal, Royal Alliance Associates, dated April 21, 2009 ("J. Rice/Royal Alliance")
201. Hattie Evans, Registered Representative, Financial Network, dated April 21, 2009 ("H. Evans/Financial Network")
202. Doria G. Bachenheimer, VP, Associate General Counsel, Regulatory Law, and Pamela Lewis Marlborough, Associate General Counsel, TIAA-CREF, dated April 22, 2009 ("TIAA-CREF")
203. Doug Richards, dated April 27, 2009 ("Richards")

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59924; File No. SR-Phlx-2009-23]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc., Order Approving Proposed Rule Change as Modified by Amendment Nos. 1 and 2 Thereto To Amend the By-Laws, Rules, and Option Floor Procedure Advices Concerning Governance of the Exchange

May 14, 2009.

On March 13, 2009, NASDAQ OMX PHLX, Inc. ("Phlx" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend its By-Laws, Rules of the Board of Governors, Options Rules, and Option Floor Procedure Advices to make changes to certain standing committees and governance processes of the Exchange. On March 25, 2009, Phlx filed Amendment No. 1 to the proposed rule change. The proposed rule change was published for comment in the *Federal Register* on April 9, 2009.³ On April 30, 2009, Phlx filed Amendment

No. 2 to the proposed rule change.⁴ The Commission received no comments regarding the proposal. This order approves the proposed rule change, as modified by Amendment Nos. 1 and 2.

In its filing, the Exchange proposes to conform its governance structure to more closely resemble that of its corporate siblings, The NASDAQ Stock Market LLC ("Nasdaq") and NASDAQ OMX BX, Inc. ("BX").⁵ In particular, Phlx proposes to eliminate the Admissions Committee and the Options Allocation, Evaluation and Securities Committee ("Allocation 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.⁶ Phlx 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 Board or its designee to take certain actions in the event of an emergency or extraordinary market conditions. Finally, the Exchange proposes technical changes that, among other things, delete obsolete references to departments and positions that have been re-named or no longer exist.

Pursuant to this proposed rule change, the eleven current standing committees of the Board of Governors of the Exchange ("Board") would be reduced to eight.⁷ Of those eight, the

⁴ In Amendment No. 2, Phlx made technical and conforming changes to certain By-Laws, including changes to the paragraph numbering in Article I, Section 1-1 (Definitions) and revisions to the marking of new rule text in Article X, Sections 10-1 (Standing Committees) and 10-15 (Finance Committee). These changes were designed to reflect intervening amendments to those By-Laws proposed in a preceding Phlx filing (File No. SR-Phlx-2009-17) that were recently approved by the Commission. See Securities Exchange Act Release No. 59794 (April 20, 2009), 74 FR 18761 (April 24, 2009) (SR-Phlx-2009-17). Because Amendment No. 2 is technical in nature, the Commission is not required to publish it for comment.

⁵ The Exchange, Nasdaq, and BX are subsidiaries of The NASDAQ OMX GROUP, Inc. See Securities Exchange Act Release No. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR-Phlx-2008-31) (order approving changes to the Exchange's governing documents in connection with its acquisition by The NASDAQ OMX Group, Inc.).

⁶ The Weekly Bulletin contained, among other things, notice of changes in permit holder and member organization status and applications. Currently, if the Admissions Committee votes favorably regarding a request by an applicant, Phlx posts his or her name in the Weekly Bulletin and on its Web site for seven days to invite readers to report information regarding applications and applicants. The Exchange proposes to eliminate the Weekly Bulletin and instead provide notification regarding membership approvals on its Web site.

⁷ The remaining standing committees would be: Executive Committee, Audit Committee, Business Conduct Committee, Compensation Committee,

Finance Committee would become optional at the discretion of the Board.⁸

The Commission has carefully reviewed the proposed rule change and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange⁹ including, in particular, Section 6(b)(1) of the Act,¹⁰ which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act; Section 6(b)(3) of the Act,¹¹ which requires that the rules of a national securities exchange assure a fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker or dealer; and Section 6(b)(5) of the Act,¹² which requires that an exchange have rules designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.

The proposed rule change will conform certain of the By-Laws and rules of the Exchange to those of Nasdaq, while maintaining the fair representation of the Exchange's members in the administration of the affairs of the Exchange. Among other things, the Exchange proposes to eliminate the Admissions Committee, and to have the Phlx Membership Department perform the functions that are currently performed by the Admissions Committee. In this respect, the proposed change would reflect the practice at Nasdaq, which does not have an Admissions Committee and whose staff handles membership application

Finance Committee, Nominating Committee, Member Nominating Committee, and Quality of Markets Committee. See Phlx By-Law Article X, Section 10-1. See also Amendment No. 2 (reflecting changes made by SR-Phlx-2009-17 to create the Nominating Committee and the Member Nominating Committee).

⁸ The Exchange noted that Nasdaq's Finance Committee is also optional at the discretion of Nasdaq's board of directors. See Notice, *supra* note 3, at 74 FR 16254.

⁹ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁰ 15 U.S.C. 78f(b)(1).

¹¹ 15 U.S.C. 78f(b)(3).

¹² 15 U.S.C. 78f(b)(5).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59697 (April 2, 2009), 74 FR 16249 ("Notice").

processing and decisions regarding membership.¹³ As proposed, the Membership Department would assume responsibility for administering the admissions and membership processes currently overseen by that committee including, among other things, the admission, denial, reinstatement and revocation of membership to the Exchange.¹⁴

An applicant for Exchange membership or admission whose application is not approved currently has a right to an appeal hearing pursuant to By-Law Article XI. The Exchange proposes to include the Membership Department in this By-Law in order to permit appeals from Membership Department decisions.¹⁵ Accordingly, the current appeal rights of applicants will be preserved.

Similarly, the Exchange proposes to delete the Allocations Committee and have the Exchange's staff perform the duties and functions that are currently performed by the Allocation Committee.¹⁶

In addition, the Exchange proposes to combine its Options Committee and Foreign Currency Options Committee, which are currently two separate Board committees, into the existing Quality of Markets Committee. The duties and functions of the Exchange's reformulated Quality of Markets Committee would be analogous to those of the Nasdaq's Quality of Markets Committee and would include, among

other things, responsibility for advising the Board on issues relating to the fairness, integrity, efficiency, and competitiveness of the Exchange's market. The Quality of Markets Committee would include a number of Member Representative members that is equal to at least twenty percent of the total number of members of the Quality of Markets Committee.¹⁷ In addition, the number of Non-Industry members on the Quality of Markets Committee would equal the sum of the number of Industry members and Member Representative members. Accordingly, the proposed new formulation for the Quality of Markets Committee would continue to assure the fair representation of the Exchange's members on this committee.

The Exchange also proposes to provide that the President of the Exchange, and his or her designated staff, would have general supervision over the options trading floor as well as general supervision over the dealings of members on the trading floor and on Exchange trading systems. The President would also be given responsibility regarding supervision of relations with other options exchanges. The Exchange notes that such authority is consistent with the practice at Nasdaq.¹⁸ Similarly, the Exchange proposes to adopt a By-Law provision similar to Nasdaq that authorizes the Board or its designee to take certain actions in the event of an emergency or extraordinary market conditions.¹⁹

Further, the Exchange proposes to alter the composition of the Business Conduct Committee, which serves as the disciplinary committee of the Exchange. As amended, the Business Conduct Committee could consist of not less than five, or more than nine, members.²⁰ In addition, the majority of committee

members would be Non-Industry members, and the remaining committee members would be Industry members. At least one BCC member would have to be a member of the Exchange that conducts an options business at Phlx. The Exchange has informed the Commission that, upon approval, it initially intends to have five persons serve on the BCC.²¹

In addition, the Exchange proposes to conform its hearings processes to more closely resemble those of Nasdaq. Specifically, the Exchange proposes to change the composition of its disciplinary hearing panel by deleting the requirement to have a presiding Hearing Officer. In its place, a new position of Hearing Attorney would be created to assume the administrative duties that the Hearing Officer previously handled. The Hearing Attorney would advise the Hearing Panel on applicable rules and procedures, but would not be a voting member of the Hearing Panel. The process of appealing Hearing Panel decisions would remain unchanged.

The Commission notes that the Exchange's proposal is designed to more closely align certain aspects of Phlx's governance structure and processes to more closely resemble that of Nasdaq, which, like the Exchange, is a subsidiary of NASDAQ OMX GROUP, Inc. As discussed above, the Commission finds that the proposal is consistent with the Act. In particular, the proposal should allow the Exchange to be so organized and have the capacity to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act, and should continue to assure the fair representation of the Exchange's members in the administration of its affairs.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-Phlx-2009-

¹³ See Notice, *supra* note 3, at note 13.

¹⁴ According to the Exchange, its staff has been "involved in virtually all aspects of the Exchange's admissions and membership process," including assisting the Admissions Committee in the performance of its duties. See Notice, *supra* note 3, at 74 FR 16250. To accomplish this transfer, the Exchange proposes to delete By-Law Article X, Section 10-6 (Admissions Committee) and transfer the duties and functions of that committee to the Membership Department in new Rule 900.1 (General Powers and Duties of Membership Department). In addition, Exchange proposes to delete By-Law Article XII, Section 12-5, which sets forth duties and functions of the Admissions Committee with respect to applications for permits and admission as a foreign currency options participant, and transfer those duties to the Membership Department in new Rule 900.2 (Membership Applications).

¹⁵ Such appeals would be heard by a special committee of the Board composed of at least three governors, at least one of which would be an Independent Governor. See Phlx By-Law Article XI, Section 11-1(c). Designated Independent Governors are selected through a process that is subject to the input of Phlx's Member Organization Representatives. See Phlx By-Law Article III, Section 3-2 (Member Nominating Committee creates a list of candidates for each Designated Governor Position); see also Article I, Section 1-1(e) (Designated Governors include Designated Independent Governors).

¹⁶ The Exchange notes that Nasdaq does have a board of directors committee that is equivalent to the Allocation Committee. See Notice, *supra* note 3, at note 20.

¹⁷ A Member Representative Member is "a member of any committee appointed by the Board of Governors who has been elected or appointed after having been nominated by the Member Nominating Committee." See Phlx By-Law Article I, Section 1-1.

¹⁸ See Notice, *supra* note 3, at note 29.

¹⁹ See Proposed Phlx By-Law Article IV, Section 4-23. See also Nasdaq By-Law Article IX, Section 5. In addition, the Exchange currently has other extraordinary market conditions provisions in its rules. See Rules 1080(e) and 98.

²⁰ The BCC currently consists of nine members including three Independent Governors, one member or person associated with a member organization who conducts business on XLE (Phlx's electronic equity trading system), one member who conducts an options business at the Exchange, and four persons who are members or persons associated with a member organization. In particular, the Exchange poses to eliminate the requirement to seat on the BCC one member or person associated with a member organization who conducts business on XLE, because XLE is no longer operating. See Notice, *supra* note 3, at note 34.

²¹ See E-mail from Jurij Trypupenko, Assistant General Counsel, The NASDAQ OMX Group, Inc., to Richard Holley III, Senior Special Counsel, Division of Trading and Markets, Commission, dated May 14, 2009. Phlx has committed to submit a separate proposed rule change by its July 2009 Board meeting to clarify in Article X, Section 10-11 that the Business Conduct Committee shall include a number of committee members equal to at least 20% of the total number of members on the Business Conduct Committee that are representative of Phlx members. This provision would be relevant only in the event that the Exchange chose to appoint six or more members to the BCC, since with a five member BCC the required appointment of "at least one" committee member who is a member of the Exchange that conducts an options business at Phlx would satisfy the 20% requirement.

23), as modified by Amendment Nos. 1 and 2, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Florence E. Harmon,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59907 File No. SR-NASDAQ-2009-042]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change To Amend Its Limited Liability Agreement

May 12, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that, on April 29, 2009, The NASDAQ Stock Market LLC (“NASDAQ Exchange” or “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. 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 NASDAQ Exchange is filing this proposed rule change with regard to proposed changes to its Limited Liability Company Agreement (the “Agreement”).³ The proposed rule change will be implemented as soon as practicable following approval by the Commission. The text of the proposed rule change is available at <http://www.cchwallstreet.com/nasdaq>, at the NASDAQ Exchange’s principal office, 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 NASDAQ 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 those statements may be examined at the places specified in Item IV below. The NASDAQ 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

On July 24, 2008, NASDAQ OMX acquired the Philadelphia Stock Exchange, Inc. (renamed NASDAQ OMX PHLX, Inc. (“PHLX”)), and on August 29, 2008, NASDAQ OMX acquired the Boston Stock Exchange, Incorporated (renamed NASDAQ OMX BX, Inc. (“BX”). Following those acquisitions, the NASDAQ Exchange, PHLX, and BX have been evaluating means to realize synergies in the operations of these three exchanges while maintaining the separate identity and member representation structures of each.

In making this evaluation, the NASDAQ Exchange and its sister exchanges have given consideration to the experiences of their respective boards and have reviewed the governance documents of other exchanges. In particular, the NASDAQ Exchange and the other exchanges have reviewed the board structures established by NYSE Euronext and its exchange subsidiaries. In Securities Exchange Act Release No. 55293,⁴ the Commission approved a structure in which certain committees of the board of directors of NYSE Euronext, the public holding company, perform functions for exchange subsidiaries, which do not themselves have these committees. Specifically, the Commission’s approval order states that “the NYSE Euronext board of directors will have an audit committee, a human resource and compensation committee, and a nominating and governance committee. Each of the audit committee, human resource and compensation committee, and nominating and governance committee of the NYSE Euronext board of directors will consist solely of directors meeting the independence requirements of NYSE Euronext. These committees also will perform relevant functions for NYSE

Group,⁵ the Exchange,⁶ NYSE Market,⁷ NYSE Regulation,⁸ Archipelago,⁹ NYSE Arca,¹⁰ and NYSE Arca Equities,¹¹ as well as other subsidiaries of NYSE Euronext, except that the board of directors of NYSE Regulation will continue to have its own compensation committee and nominating and governance committee.”

The NASDAQ Exchange and the other exchanges owned by NASDAQ OMX have also considered the experience of the NASDAQ Exchange in operating as a subsidiary of a public company since 2006. During the period, the board of each of the NASDAQ Exchange and its parent corporation (currently NASDAQ OMX, and formerly The Nasdaq Stock Market, Inc.) has appointed its own audit committee and management compensation committee. However, these committees at the NASDAQ Exchange level have generally found themselves duplicating the work of other committees at the exchange or holding company level. The NASDAQ OMX audit committee has broad authority to review the financial information that will be provided to shareholders and others, systems of internal controls, and audit, financial reporting and legal and compliance processes. Because NASDAQ OMX’s financial statements are prepared on a consolidated basis that includes the financial results of NASDAQ OMX’s subsidiaries, including the NASDAQ Exchange and the other exchange subsidiaries, the NASDAQ OMX audit committee’s purview necessarily includes these subsidiaries. The committee is composed of four or five directors, all of whom must be independent under the standards established by Section 10A(m) of the Act¹² and Rule 4200(a) of the NASDAQ Exchange. All committee members must be able to read and understand financial statements, and at least one member must have past employment experience in finance or accounting, requisite professional certification in accounting,

⁵ NYSE Group, Inc., the former public holding company of NYSE Euronext’s U.S. exchanges.

⁶ New York Stock Exchange LLC (“NYSE”), a registered national securities exchange.

⁷ NYSE Market, Inc., a subsidiary of NYSE to which it has delegated certain operational authority.

⁸ NYSE Regulation, Inc., a subsidiary of NYSE to which it has delegated certain operational authority.

⁹ Archipelago Holdings, Inc., formerly the public holding company of the entities now known as NYSE Arca, Inc. and NYSE Arca Equities, Inc.

¹⁰ NYSE Arca, Inc., a registered national securities exchange.

¹¹ NYSE Arca Equities, Inc., a subsidiary of NYSE Arca to which it has delegated certain operational authority.

¹² 15 U.S.C. 78j-1(m).

²² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Agreement includes and incorporates an exhibit designated as the By-Laws of the NASDAQ Exchange (the “By-Laws”). Under applicable Delaware law, the By-Laws are considered part of the Agreement.

⁴ Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR-NYSE-2006-120).