

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71010; File No. SR-Phlx-2013-115]

### Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing of Proposed Rule Change To Amend the Restated Certificate of Incorporation and By-Laws of The NASDAQ OMX Group, Inc.

December 6, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 27, 2013, NASDAQ OMX PHLX LLC ("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 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 is filing this proposed rule change with respect to amendments of the Restated Certificate of Incorporation (the "Charter") and By-Laws (the "By-Laws") of its parent corporation, The NASDAQ OMX Group, Inc. ("NASDAQ OMX" or the "Company"). The proposed amendments will be implemented on a date designated by NASDAQ OMX following approval by the Commission. The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaqomxphlx.cchwallstreet.com>, 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

NASDAQ OMX is proposing to make certain amendments to its Charter and By-Laws.

##### (i) Background

At NASDAQ OMX's 2012 annual meeting held on May 22, 2012, NASDAQ OMX's stockholders considered two proposals submitted by individual stockholders. The first proposal, which passed with 68% of the votes cast, requested that NASDAQ OMX's Board take steps to replace each supermajority voting standard in the Charter and By-Laws<sup>3</sup> with a voting standard requiring a "majority of votes cast." The second proposal, which did not pass but received 49% of the votes cast, requested that NASDAQ OMX's Board take steps to enable stockholders having at least one-tenth of NASDAQ OMX's voting power to call a special meeting of stockholders.

Following the 2012 annual meeting, the Nominating & Governance Committee of NASDAQ OMX's Board reviewed the voting results on the two stockholder proposals and discussed the stockholder voting standards and rights contemplated by the Charter and By-Laws. Following this review, the Nominating & Governance Committee recommended to the Board, and the Board approved, certain changes to the Charter and By-Laws to address the two stockholder proposals and make other changes. NASDAQ OMX now proposes to make these changes, which are described further below.

##### (ii) Proposed Amendments to Charter

##### (a) Removal and Replacement of Supermajority Voting Requirements

To respond to feedback from its stockholders, NASDAQ OMX proposes to replace each supermajority voting requirement in the Charter with a "majority of outstanding shares" voting requirement. The Charter currently includes the following three supermajority voting requirements.

- *Removal of Directors.* Article Fifth, Paragraph D provides that, except for directors elected by the holders of any series of preferred stock, any director, or the entire Board, may be removed from office at any time, but only by the

affirmative vote of at least 66⅔% of the total voting power of the outstanding shares of NASDAQ OMX's capital stock entitled to vote generally in the election of directors (the "Voting Stock"), voting together as a single class.

- *Adoption, Alteration, Amendment and Repeal of By-Laws.* Article Eighth, Paragraph A provides that the affirmative vote of the holders of at least 66⅔% of the total voting power of the outstanding Voting Stock, voting together as a single class, shall be required in order for the stockholders to adopt, alter, amend or repeal any By-Law.

- *Adoption, Alteration, Amendment and Repeal of Certain Charter Provisions.* Article Ninth, Paragraph A provides that the affirmative vote of the holders of at least 66⅔% of the voting power of the outstanding Voting Stock, voting together as a single class, shall be required to amend, repeal or adopt any provision inconsistent with paragraph C of Article Fourth,<sup>4</sup> Article Fifth,<sup>5</sup> Article Seventh,<sup>6</sup> Article Eighth<sup>7</sup> or Article Ninth of the Charter.<sup>8</sup>

In each of the three provisions described above, NASDAQ OMX proposes to remove the requirement for an affirmative vote of at least 66⅔% of the total voting power of the Voting Stock and replace it with a voting standard requiring the affirmative vote of a majority of the outstanding Voting Stock. In developing this proposal, NASDAQ OMX considered the relative weight of the arguments for and against supermajority voting requirements. Historically, supermajority voting requirements have protected corporations against coercive takeover tactics by requiring broad stockholder support for certain types of transactions or governance changes. However, in recent years, corporate governance standards have evolved, and many stockholder rights advocates argue that supermajority voting requirements

<sup>4</sup> Paragraph C of Article Fourth sets forth the 5% voting limitation, which provides that holders of NASDAQ OMX's voting securities may not cast votes in excess of 5% of NASDAQ OMX's outstanding voting securities. To be clear, NASDAQ OMX is not proposing any change to the 5% voting limitation itself. NASDAQ OMX only proposes that any future amendment of the 5% voting limitation will require the approval of stockholders holding a majority of the outstanding shares, rather than stockholders holding 66⅔% of the outstanding shares.

<sup>5</sup> Article Fifth includes certain provisions relating to the Board, such as Board size and director elections.

<sup>6</sup> Article Seventh prohibits stockholder action by written consent.

<sup>7</sup> Article Eighth establishes the procedures to adopt, alter, amend or repeal the By-Laws.

<sup>8</sup> Article Ninth establishes the procedures to adopt, alter, amend or repeal the Charter.

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

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

<sup>3</sup> These provisions, which are described further below, require the affirmative vote of at least 66⅔% of the total voting power of the outstanding shares of NASDAQ OMX's capital stock to approve certain actions.

limit stockholders' participation in corporate governance. NASDAQ OMX believes that while it is important to protect against coercive takeover tactics, it is also critically important to obtain stockholder input and respond to stockholder concerns about corporate governance.

NASDAQ OMX believes that the proposed "majority of outstanding shares" voting requirement will continue to provide some protection against proposals that are harmful to the stockholders. While this requirement is less difficult to satisfy than a supermajority voting requirement, it is more difficult to satisfy than a "majority of votes cast" requirement, which NASDAQ OMX considered as an alternate option. NASDAQ OMX believes that a "majority of outstanding shares" standard is a balanced outcome that responds to stockholder feedback while appropriately maintaining NASDAQ OMX's defensive posture against hostile takeovers.

#### (b) Non-Substantive Changes

NASDAQ OMX also proposes to amend and restate the Charter to make other non-substantive changes. Specifically, the proposal deletes obsolete references to the following:

- The 3.75% Series A Convertible Notes due 2012 and the 3.75% Series B Convertible Notes due 2012, which are no longer outstanding, in Article Fourth, Paragraph C and Article Eleventh;
- a voting trust agreement, which is no longer in effect, in Article Fourth, Paragraph C(3)(b)(iii);
- ownership of NASDAQ OMX securities by the National Association of Securities Dealers, Inc., certain affiliates of Hellman & Friedman LLC, and certain affiliates of Silver Lake, none of which currently own any NASDAQ OMX securities, in Article Fourth, Paragraph C(6);<sup>9</sup> and

<sup>9</sup> NASDAQ OMX notes that the remaining text of Article Fourth, Paragraph C(6) of the Charter includes an obsolete cross-reference to Section 6(b) of Article Fourth, Paragraph C in the second sentence, which begins "The Board, however, may not approve an exemption under Section 6(b). . . ." NASDAQ OMX cannot correct this cross-reference, which should refer to Section 6 without further reference to a subsection (b), without seeking further approval of its stockholders, which would require NASDAQ OMX to call and hold a stockholder meeting. Generally, NASDAQ OMX holds stockholder meetings, which are time consuming and expensive, only once or twice a year. Moreover, it is atypical of a large public company like NASDAQ OMX to submit a proposal to its stockholders solely to correct a cross-reference in its Charter. However, NASDAQ OMX believes, following consultation with outside counsel, that it is clear, based on the drafting history of this provision, that the intent of the cross-reference is to refer to Section 6 of Article Fourth, Paragraph C of the Charter. In other words, the second sentence

- the phase-out of the classified board structure, which was complete in 2007, in Article Fifth, Paragraph B.

In Article Fifth, Paragraph B, the proposal also clarifies that the election of directors by stockholders shall occur at an annual or special meeting. The proposal corrects a typographical error in Article Fifth, Paragraph A and renumbers the provisions of the Charter, where necessary following the other amendments. Finally, the proposal amends the introductory and concluding language of the Charter to incorporate language that will be required under Delaware law when the amended and restated Charter is filed with the Secretary of State of the State of Delaware.<sup>10</sup>

The amendment and restatement of the Charter to incorporate these non-substantive changes will simplify and streamline the document.

#### (iii) Proposed Elimination of Certificate of Designation

NASDAQ OMX proposes to eliminate its Certificate of Designation, Preferences and Rights of Series A Convertible Preferred Stock (the "Series A Convertible Preferred Stock"), and all matters set forth therein. The Series A Convertible Preferred Stock was created in 2009 to facilitate the conversion of certain notes into common stock.<sup>11</sup> The Company authorized 2 million shares of

of Article Fourth, Paragraph C(6) should read: "The Board, however, may not approve an exemption under Section 6: (i) for a registered broker or dealer or an Affiliate thereof or (ii) an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act." Under no circumstances will NASDAQ OMX read the obsolete cross-reference to imply that the Board could grant an exemption to the ownership limitation in Article Fourth, Paragraph C(6) of the Charter for a registered broker or dealer or an Affiliate thereof, or an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act. NASDAQ OMX also notes that it is proposing amendments to Section 12.5 of the By-Laws to eliminate cross-references to subsection (b) of Article Fourth, Paragraph C(6) of the Charter. Finally, NASDAQ OMX notes that there are some differences in language between the second sentence of Article Fourth, Paragraph C(6) of the Charter and the second sentence of Section 12.5 of the By-Laws. To the extent that these differences would cause a difference in interpretation, NASDAQ OMX notes, following consultation with outside counsel, that the Charter language shall prevail. As soon as feasible, NASDAQ OMX plans to present a proposal to the stockholders to conform this provision of the Charter to the By-Laws.

<sup>10</sup> See Sections 242 and 245 of the DGCL.

<sup>11</sup> See Securities Exchange Act Release No. 60845 (October 20, 2009), 74 FR 55078 (October 26, 2009) (SR-BX-2009-061, SR-NASDAQ-2009-087, SR-Phlx-2009-88); see also Securities Exchange Act Release No. 61000 (November 13, 2009), 74 FR 61390 (November 24, 2009) (SR-BSECC-2009-005); see also Securities Exchange Act Release No. 61001 (November 13, 2009), 74 FR 61391 (November 24, 2009) (SR-SCCP-2009-04).

the Series A Convertible Preferred Stock and immediately issued 1.6 million of those shares to the converting noteholders.

In 2010, following stockholder approval, all 1.6 million issued shares of the Series A Convertible Preferred Stock were converted into common stock. Since then, no shares of the Series A Convertible Preferred Stock have been outstanding, and the Company has no intention to issue further shares of this series.

As a clean-up matter, the Company seeks to file a certificate of elimination with the Secretary of State of the State of Delaware to eliminate the Series A Convertible Preferred Stock. Under Delaware law, a certificate of elimination is deemed to be an amendment to NASDAQ OMX's Charter; however, since the amendment is limited in scope, it does not require the approval of NASDAQ OMX's stockholders.<sup>12</sup>

#### (iv) Proposed Amendments to the By-Laws

##### (a) Special Meetings of Stockholders

Current Section 3.2 of NASDAQ OMX's By-Laws provides that only NASDAQ OMX may call special meetings of its stockholders.<sup>13</sup> To respond to feedback from its stockholders, as discussed above, NASDAQ OMX proposes to delete this provision and replace it with language that will allow NASDAQ OMX's stockholders to call special meetings after following particular procedures. Similar to the elimination of supermajority voting requirements, which is discussed above, the implementation of the right of stockholders to call a special meeting has received recent attention from investor and corporate governance advocates. These advocates argue that such a right will enable stockholders to raise and act on matters that arise between annual meetings.

Following discussions with some of its stockholders, NASDAQ OMX agrees that it is appropriate to allow stockholders who meet certain procedural requirements to call a special meeting. In proposing these procedural requirements, NASDAQ OMX's goals are to ensure timely notice of a meeting request and to gather sufficient information about the proposing stockholder(s) and the

<sup>12</sup> See Section 151(g) of the DGCL.

<sup>13</sup> Under Delaware law, special meetings of a corporation's stockholders may be called by the board of directors or by such persons as may be authorized by the certificate of incorporation or the bylaws. See Section 211(d) of the DGCL.

proposal. Among other things, this information will ensure that NASDAQ OMX is able to comply with its disclosure and other requirements under applicable law and that NASDAQ OMX, its Board and its stockholders are able to assess the proposal adequately. The proposed procedural requirements are set forth below.

First, proposed Section 3.2(a) provides that special meetings of NASDAQ OMX's stockholders may only be called: (i) At any time by NASDAQ OMX's Board pursuant to a resolution adopted by a majority of the total number of directors NASDAQ OMX would have if there were no vacancies; and (ii) by NASDAQ OMX's Corporate Secretary following the receipt of a written request in proper form for a special meeting (a "Special Meeting Request") by one or more stockholders. Such stockholders (the "Requisite Holders") must hold of record, in the aggregate, at least 15 percent of NASDAQ OMX's outstanding shares of capital stock entitled to vote on matters to be brought before the special meeting (the "Requisite Percentage"). Such shares must be "Net Long Shares,"<sup>14</sup> and the Requisite Holders must have held the shares continuously for at least one year as of the date of the Special Meeting Request. Whether shares constitute Net Long Shares shall ultimately be decided by NASDAQ

OMX's Board in its reasonable determination. The intent of the requirement for stockholders to maintain a "net long position" is to limit the ability to call a special meeting to stockholders that have long-term record and economic positions in NASDAQ OMX.

Proposed Section 3.2(a) also sets forth the procedures for determining whether a special meeting has been requested by Requisite Holders representing in aggregate at least the Requisite Percentage if multiple Special Meeting Requests are delivered to NASDAQ OMX's Corporate Secretary. Multiple requests will be considered together only if: (i) Each Special Meeting Request identifies substantially the same purpose or purposes of the special meeting and substantially the same matters proposed to be acted on at the requested special meeting (in each case as determined in good faith by NASDAQ OMX's Board); and (ii) such Special Meeting Requests have been dated and delivered to NASDAQ OMX's Corporate Secretary within 60 days of the earliest dated Special Meeting Request. NASDAQ OMX believes these procedures are reasonable and clear and notes that they grant only limited discretion to NASDAQ OMX's Board in determining whether Special Meeting Requests will be considered together.

Pursuant to proposed Section 3.2(b), if a Special Meeting Request is in proper form, NASDAQ OMX's Board shall determine the place, if any, date and time of the special meeting, and NASDAQ OMX's Corporate Secretary shall call the special meeting within 120 days after the date the Special Meeting Request was delivered. However, NASDAQ OMX's Board may, in lieu of calling a special meeting, present an identical or substantially similar item of business (a "Similar Item"),<sup>15</sup> as determined in good faith by NASDAQ OMX's Board, for stockholder approval at any other meeting of the stockholders that is held not less than 120 days after the delivery of the Special Meeting Request. The intent of this provision is to save NASDAQ OMX the time and expense of calling and holding a special meeting if NASDAQ OMX intends to hold a separate stockholders' meeting within 120 days. In fixing the place, if any, date and time for any special meeting, NASDAQ OMX's Board may consider such factors as it deems relevant in its business judgment, including the nature of the matters to be

considered, the facts and circumstances surrounding any request for a meeting and any plan of the Board to call an annual meeting or a special meeting.

Proposed Section 3.2(c) sets forth certain limitations on Special Meeting Requests. Specifically, a Special Meeting Request will not be valid if:

- It relates to an item of business that is not a proper subject for stockholder action under applicable law;
- it is delivered during the period commencing 90 days prior to the one-year anniversary of the date of the immediately preceding annual meeting and ending on the date of the next annual meeting;
- a Similar Item was presented at any meeting of stockholders held within 120 days prior to the date on which the Special Meeting Request was delivered; or
- a Similar Item is included in NASDAQ OMX's notice of meeting as an item of business to be presented at a stockholder's meeting that has been called but not yet held.

The Board may adjourn or reschedule any previously scheduled special meeting of the stockholders. NASDAQ OMX believes the subject matter limitations set forth in proposed Section 3.2(c) are appropriate in order to comply with applicable law and to prevent multiple considerations of the same item of business. NASDAQ OMX believes the time limits set forth in proposed Section 3.2(c) are appropriate to ensure that NASDAQ OMX is not required to incur the time and expense of calling and holding a special meeting of stockholders immediately prior to an upcoming annual meeting of stockholders or if a Similar Item of business already has been presented at a recent stockholders' meeting.

To be in proper form, a Special Meeting Request must comply with certain requirements, as described further below.<sup>16</sup> NASDAQ OMX's Board will have the sole discretion to determine whether a Special Meeting Request is in proper form.<sup>17</sup> Proposed Section 3.2(d) sets forth the requirements for a Special Meeting Request to be in proper form. These proposed requirements will ensure that NASDAQ OMX has sufficient information to comply with its disclosure requirements under applicable law and that the Requisite Holders maintain a sufficient ownership level through the date of the special meeting. Specifically, a Special Meeting Request shall:

<sup>14</sup> For purposes of determining Requisite Holders under proposed Section 3.2, "Net Long Shares" shall be limited to the number of shares beneficially owned, directly or indirectly, by any stockholder or beneficial owner that constitute such person's "net long position" as defined in Rule 14e-4 under the Act, provided that (A) for the purposes of this definition, references in the rule to "the date the tender offer is first publicly announced or otherwise made known by the bidder to the holders of the security to be acquired" shall be the date of the relevant Special Meeting Request and all dates in the one year period prior thereto, the "highest tender offer price or stated amount of the consideration offered for the subject security" shall refer to the closing sales price of NASDAQ OMX's capital stock on NASDAQ on such date (or, if such date is not a trading day, the next succeeding trading day), the "person whose securities are the subject of the offer" shall refer to NASDAQ OMX, a "subject security" shall refer to the issued and outstanding voting stock of NASDAQ OMX; and (B) the net long position of such stockholder shall be reduced by any shares as to which such person does not have the right to vote or direct the vote at the proposed special meeting or as to which such person has entered into a derivative or other agreement, arrangement or understanding that hedges or transfers, in whole or in part, directly or indirectly, any of the economic consequences of ownership of such shares. In addition, to the extent any affiliates of the stockholder or beneficial owner are acting in concert with the stockholder or beneficial owner with respect to the calling of the special meeting, the determination of Net Long Shares may include the effect of aggregating the Net Long Shares (including any negative number) of such affiliate or affiliates. See proposed Section 3.2(a) of the By-Laws.

<sup>15</sup> Under proposed Section 3.2(b) of the By-Laws, the election of directors shall be deemed a "Similar Item" with respect to all items of business involving the nomination, election or removal of directors.

<sup>16</sup> See proposed Section 3.2(a) of the By-Laws.

<sup>17</sup> *Id.*

- Be in writing, signed by each Requesting Person<sup>18</sup> and delivered to NASDAQ OMX's Corporate Secretary at NASDAQ OMX's principal executive offices;

- set forth certain information with respect to (i) each person the Requesting Person proposes to nominate for director, (ii) any business the Requesting Person proposes to bring before the meeting and (iii) each Requesting Person;<sup>19</sup> and

- include (i) an agreement by each Requisite Holder to immediately deliver written notice to NASDAQ OMX's Corporate Secretary in the case of any disposition, on or prior to the record date for the special meeting, of any shares of NASDAQ OMX's capital stock held of record by such Requisite Holder and (ii) an acknowledgement that (1) any such disposition shall be deemed a revocation of the Special Meeting Request to the extent of such disposition and (2) if, following such deemed revocation, the Requisite Holders hold of record, in the aggregate, less than the Requisite Percentage of the voting power of all outstanding shares of NASDAQ OMX's capital stock entitled to vote generally in the election of directors, NASDAQ OMX shall have no obligation to hold the special meeting.

Proposed Section 3.2(f) provides that at any special meeting of the stockholders, the only business to be conducted or considered will have been specified in the notice of meeting (or any supplement thereto) given by or at the direction of NASDAQ OMX's Board or Corporate Secretary, as the case may be. In any event, however, NASDAQ OMX's Board may submit its own proposal or proposals for consideration at a special meeting. Except as otherwise allowed under proposed Section 3.2, stockholders will not be permitted to propose business to be brought before a special meeting of the stockholders. NASDAQ OMX believes these provisions are reasonable and necessary to limit the items of business that may be considered at a special meeting to those that were proposed by the Company, the Board or stockholders that comply with the requirements and procedures set forth in the By-Laws.

<sup>18</sup> "Requesting Person" means (i) each Requisite Holder, (ii) the beneficial owner or beneficial owners, if different, on whose behalf the Special Meeting Request is being delivered to NASDAQ OMX's Corporate Secretary and (iii) any affiliate or associate of such stockholder or beneficial owner. See proposed Section 3.2(e) of the By-Laws.

<sup>19</sup> The information required is the same information required from Proposing Persons with respect to nominations or items of business to be brought before an annual meeting of stockholders and is described in detail in Section (iv)(b) below.

Proposed Section 3.2(g) will require the Requisite Holders giving a Special Meeting Request to further update and supplement the request, if necessary, so that the information in the request is true and correct as of the record date for the special meeting and as of the 10th business day prior to the special meeting or any adjournment or postponement thereof. This requirement will ensure that NASDAQ OMX, its Board and its other stockholders are notified of changes to the information they will consider in assessing a proposed item of business prior to the special meeting. In the case of an update and supplement required to be made as of the record date, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the fifth business day after the record date for the special meeting. In the case of an update and supplement required to be made as of the 10th business day prior to the special meeting or any adjournment or postponement thereof, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the eighth business day prior to the date for the special meeting or, if practical, any adjournment or postponement thereof (and, if not practicable, on the first practicable date prior to the date to which the special meeting has been adjourned or postponed).

Proposed Section 3.2(h) will allow the Requisite Holders to revoke a Special Meeting Request by written revocation delivered to NASDAQ OMX at any time prior to the special meeting requested. However, NASDAQ OMX's Board will have the discretion to determine whether or not to proceed with the special meeting. The Board might wish to continue with the special meeting if, for example, the Company has already spent the time and expense required to call the meeting or if the agenda for the meeting includes items other than those proposed in the Special Meeting Request.

Finally, NASDAQ OMX proposes to designate as Section 3.2(i) existing text that sets forth the requirements for stockholders to submit nominees for election as directors at certain stockholder meetings. NASDAQ OMX further proposes to make a minor change to this text to clarify that NASDAQ OMX's Board, rather than the Company itself, will call a special meeting on behalf of the Company.

#### (b) Annual Meetings of Stockholders

Section 3.1 of NASDAQ OMX's By-Laws, which is the "advance notice"

provision,<sup>20</sup> requires stockholders to notify NASDAQ OMX, during a specified period in advance of an annual meeting, of their intention to nominate one or more persons for election to the Board or to present a business proposal for consideration by the stockholders at the meeting. While designing the proposed procedural requirements for stockholders to call a special meeting, as outlined above, NASDAQ OMX evaluated the existing procedural requirements for stockholders to bring business before an annual meeting. NASDAQ OMX is therefore proposing changes to some of these procedures to enhance them and conform them, in some cases, to the procedures relating to special meetings. Generally, the proposed amendments add requirements for extensive disclosures by proposing stockholders about themselves, any proposed nominees for director and any proposed items of business to be brought before a meeting. The specific amendments are discussed in detail below.

First, Section 3.1(a) of the By-Laws currently states that nominations of persons for election to NASDAQ OMX's Board and the proposal of other business to be considered by the stockholders at an annual meeting of stockholders may be made only: (i) Pursuant to the Company's notice of meeting (or any supplement thereto); (ii) by or at the direction of NASDAQ OMX's Board or its Nominating & Governance Committee; or (iii) by any stockholder of the Company that meets certain requirements. These requirements state that the stockholder must: (i) Be a stockholder of record at the time of delivery of notice to the Company of nominees or other business to be conducted at the meeting; (ii) be entitled to vote at the meeting; and (iii) comply with the notice procedures set forth in the By-Laws. NASDAQ OMX proposes to add a parenthetical to the requirement that a stockholder must be a stockholder of record to clarify that a nomination or proposal of other business may be made on behalf of a beneficial owner, if different from the stockholder of record, only if the beneficial owner is the beneficial owner of NASDAQ OMX shares. This modification will clarify that both

<sup>20</sup> "Advance notice" provisions allow stockholder(s) to bring business before an annual meeting of stockholders, but set forth procedural requirements to ensure that companies and boards have sufficient information about the proposal and the proposing stockholder(s), as well as adequate time to consider the proposal, by requiring the proposing stockholder(s) to give advance notice of the intention to bring the proposal before the annual meeting.

record and beneficial owners of NASDAQ OMX stock have the right to propose nominees or business to be considered at an annual meeting. NASDAQ OMX further proposes that a stockholder who proposes nominees or business to be considered at an annual meeting must hold shares in the Company at the time of the meeting, in addition to the time of delivery of the required notice to the Company. This will ensure that a stockholder retains an interest in the Company until the meeting at which the stockholder's nominee or other business is considered. Finally, NASDAQ OMX proposes to number the procedural requirements for stockholders who propose nominees or business to make them easier to understand.

Currently, Section 3.1(b) of the By-Laws sets forth the requirements for a stockholder's notice to NASDAQ OMX of nominations or other business to be considered at an annual meeting. NASDAQ OMX proposes certain amendments to this section to ensure that NASDAQ OMX has sufficient information about such nominations or other business proposed by a stockholder to enable the Company, the Board and the other stockholders to assess a position on the nominations or other business. The additional information requirements will also ensure that NASDAQ OMX can make adequate disclosures to its stockholders and comply with requirements under applicable law.

Specifically, NASDAQ OMX proposes an amendment to the first paragraph of this section to require a stockholder who provides a notice relating to a nomination to include with the notice, a completed and signed questionnaire, representation and agreement relating to the nominee(s) for director.<sup>21</sup> NASDAQ OMX also proposes to require a stockholder who provides a notice to further update and supplement the notice, if necessary, so that the information in the notice is true and correct as of the record date for the annual meeting and as of the 10th business day prior to the annual meeting or any adjournment or postponement thereof.<sup>22</sup> This requirement will ensure that NASDAQ OMX, its Board and its other stockholders are notified of changes to

the information they will consider in assessing a proposed item of business prior to the annual meeting. In the case of an update and supplement required to be made as of the record date, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the fifth business day after the record date for the annual meeting. In the case of an update and supplement required to be made as of the 10th business day prior to the annual meeting or any adjournment or postponement thereof, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the eighth business day prior to the date for the annual meeting or, if practicable, any adjournment or postponement thereof (and, if not practicable, on the first practicable date prior to the date to which the annual meeting has been adjourned or postponed).

Section 3.1(b)(i) of the By-Laws currently sets forth the information that a stockholder must provide to NASDAQ OMX about each person whom the stockholder proposes to nominate for election as a director. NASDAQ OMX proposes changes to this section to use the defined term "Proposing Person" instead of stockholder,<sup>23</sup> to require information with respect to nominees for reelection as well as nominees for election, to correct a reference to the Act and to add numbering and other organizational changes to make the requirements easier to read and understand. NASDAQ OMX also proposes to require the same information with respect to a proposed nominee that will be required with respect to a Proposing Person, as discussed further below. In addition, NASDAQ OMX proposes to add two new informational requirements for proposed nominees, including:

- A description of all direct and indirect compensation and other material monetary agreements, arrangements and understandings during the past three years, and any other material relationships, between or among any Proposing Person, on the one hand, and such proposed nominee and any of his or her respective affiliates and associates, on the other hand, including,

without limitation, all information that would be required to be disclosed pursuant to Item 404 under Regulation S-K if such Requesting Person were the "registrant" for purposes of such rule and the proposed nominee were a director or executive officer of such registrant; and

- a completed and signed questionnaire, representation and agreement.<sup>24</sup>

Finally, NASDAQ OMX proposes to add a catch-all provision to Section 3.1(b)(i) of the By-Laws that will allow the Company to require any proposed nominee to furnish such other information (i) as the Company may reasonably require to determine the eligibility of such proposed nominee to serve as a director or (ii) that could be material to a reasonable stockholder's understanding of the independence, or lack of independence, of such proposed nominee. NASDAQ OMX believes that all of the new information requirements included in proposed Section 3.1(b)(i) are reasonable and necessary in order to assist the Company in evaluating director eligibility, independence and potential conflicts of interest.

Section 3.1(b)(ii) of the By-Laws currently sets forth the information that a stockholder must provide to NASDAQ OMX about any business, other than nominations for director, that the stockholder proposes to bring before an annual meeting. NASDAQ OMX proposes changes to this section to require that the description of the proposed business be reasonably detailed, to use the defined term "Proposing Person" instead of stockholder and beneficial owner in certain places and to add numbering, reordering and other organizational changes to make the requirements easier to read and understand. NASDAQ OMX also proposes to add a new requirement for a stockholder to provide a reasonably detailed description of all contracts, agreements, arrangements and understandings between or among any of the Proposing Persons or between or among any Proposing Person in connection with the proposal. NASDAQ OMX believes this information will be useful in assessing the aims and incentives of Proposing Persons in proposing business before an annual meeting.

Section 3.1(b)(iii) of the By-Laws currently sets forth the information that a stockholder who proposes nominee(s) for director or other business to be put forth before an annual meeting must

<sup>21</sup> The contents of and rationale for the questionnaire, representation and agreement are discussed further in Section (iv)(c) below.

<sup>22</sup> NASDAQ OMX notes that this proposal is similar to proposed Section 3.2(g) of the By-Laws, which requires updates and supplements to a stockholder notice relating to a special meeting. This proposed change is discussed further in Section (iv)(a) above.

<sup>23</sup> "Proposing Person" means (i) the stockholder providing the notice of business or the notice of the nomination, as applicable, proposed to be brought before an annual meeting, (ii) any beneficial owner or beneficial owners, if different, on whose behalf such business is proposed to be brought before the meeting or the notice of the nomination proposed to be made at the meeting is made, as applicable, and (iii) any affiliate or associate (each within the meaning of Rule 12b-2 under the Act for purposes of the By-Laws) of such stockholder or beneficial owner. See proposed Section 3.1(c) of the By-Laws.

<sup>24</sup> The contents of and rationale for the questionnaire, representation and agreement are discussed further in Section (iv)(c) below.

provide to NASDAQ OMX about such stockholder and the beneficial owner, if any, on whose behalf the nomination or proposal is made. NASDAQ OMX proposes changes to this section to use the defined term "Proposing Person" instead of stockholder and beneficial owner in certain places and to add numbering, reordering and other organizational changes to make the requirements easier to read and understand.

Relating to the existing requirement in Section 3.1(b)(iii)(B) that a proposing stockholder describe the class or series and number of shares of NASDAQ OMX capital stock owned beneficially and of record by such stockholder and the beneficial owner, NASDAQ OMX proposes to add a parenthetical stating that beneficial ownership shall be determined within the meaning of Rule 13d-3 under the Act. NASDAQ OMX also proposes to state that a Proposing Person shall in all events be deemed to beneficially own any shares of any class or series of NASDAQ OMX's capital stock as to which such person has a right to acquire beneficial ownership at any time in the future. These proposed changes merely clarify how the concept of beneficial ownership will be interpreted under this section of the By-Laws.

Current Section 3.1(b)(iii)(D) requires proposing stockholders to describe to NASDAQ OMX any agreement, arrangement or understanding (including any derivative or short positions, profit interests, options, warrants, convertible securities, stock appreciation or similar rights, hedging transactions, and borrowed or loaned shares) that has been entered into as of the date of the notice by the stockholder and the beneficial owners with respect to NASDAQ OMX's stock. Given the increased complexity of such transactions in today's marketplace, NASDAQ OMX proposes to replace the current language with a similar requirement for disclosure of any Synthetic Equity Interest,<sup>25</sup> without

regard to whether: (i) the derivative, swap or other transaction or series of transactions conveys any voting rights in such shares to the Proposing Person; (ii) the derivative, swap or other transaction or series of transactions is required to be, or is capable of being, settled through delivery of such shares; or (iii) the Proposing Person may have entered into other transactions that hedge or mitigate the economic effect of such derivative, swap or other transaction or series of transactions.

This proposed provision will assist NASDAQ OMX, its Board and its other stockholders in understanding a Proposing Person's full economic interests in NASDAQ OMX and possible aims and incentives in submitting the proposed business for consideration at an annual meeting.

For this same reason, NASDAQ OMX also proposes to add several new disclosures that a Proposing Person must include in a notice to NASDAQ OMX regarding nominees or other business to be conducted at an annual meeting. These include disclosures regarding:

- Any proxy (other than a revocable proxy or consent given in response to a solicitation made pursuant to, and in accordance with, Section 14(a) of the Act by way of a solicitation statement filed on Schedule 14A), agreement, arrangement, understanding or relationship pursuant to which the Proposing Person has or shares a right to vote any shares of any class or series of NASDAQ OMX;<sup>26</sup>

- any proportionate interest in NASDAQ OMX shares or Synthetic Equity Interest held, directly or indirectly, by a general or limited partnership in which the Proposing Person is a general partner or, directly or indirectly, beneficially owns an interest in a general partner;<sup>27</sup>

- any agreement, arrangement, understanding or relationship, including any repurchase or similar so-called "stock borrowing" agreement or arrangement, entered into or engaged in, directly or indirectly, by the Proposing Person, the purpose or effect of which is to mitigate loss to, reduce the economic risk (of ownership or otherwise) of shares of any class or series of NASDAQ OMX by, manage the risk of share price changes for, or increase or decrease the voting power of, the Proposing Person with respect to shares of any class or series of NASDAQ

class or series of NASDAQ OMX. See proposed Section 3.1(b)(iii)(D) of the By-Laws.

<sup>26</sup> See proposed Section 3.1(b)(iii)(E) of the By-Laws.

<sup>27</sup> See proposed Section 3.1(b)(iii)(F) of the By-Laws.

OMX, or that provides, directly or indirectly, the opportunity to profit from any decrease in the price or value of shares of any class or series of NASDAQ OMX (any of the foregoing, a "Short Interest");<sup>28</sup>

- any performance-related fees (other than an asset-based fee) to which the Proposing Person is entitled based on any increase or decrease in the price or value of shares of any class or series of NASDAQ OMX, or any Synthetic Equity Interest or Short Interest;<sup>29</sup>

- any significant equity interest or any Synthetic Equity Interest or Short Interest in any principal competitor of NASDAQ OMX held by the Proposing Person;<sup>30</sup>

- any direct or indirect interest of the Proposing Person in any contract with NASDAQ OMX, any affiliate of NASDAQ OMX or any principal competitor of NASDAQ OMX (including, in any such case, any employment agreement, collective bargaining agreement or consulting agreement);<sup>31</sup>

- any pending or threatened litigation in which the Proposing Person is a party or material participant involving NASDAQ OMX or any of its officers or directors, or any affiliate of NASDAQ OMX;<sup>32</sup>

- any material transaction occurring, in whole or in part, during the then immediately preceding 12-month period between such Proposing Person, on the one hand, and NASDAQ OMX, any affiliate of NASDAQ OMX or any principal competitor of NASDAQ OMX, on the other hand;<sup>33</sup> and

- any other information relating to the Proposing Person required to be disclosed in a proxy statement or other filings required to be made in connection with solicitations of proxies for, as applicable, the proposal and/or for the election of directors in an election contest pursuant to and in accordance with Section 14(a) of the Act and the rules and regulations promulgated thereunder.<sup>34</sup>

<sup>28</sup> See proposed Section 3.1(b)(iii)(G) of the By-Laws.

<sup>29</sup> See proposed Section 3.1(b)(iii)(H) of the By-Laws.

<sup>30</sup> See proposed Section 3.1(b)(iii)(I) of the By-Laws.

<sup>31</sup> See proposed Section 3.1(b)(iii)(J) of the By-Laws.

<sup>32</sup> See proposed Section 3.1(b)(iii)(K) of the By-Laws.

<sup>33</sup> See proposed Section 3.1(b)(iii)(L) of the By-Laws.

<sup>34</sup> See proposed Section 3.1(b)(iii)(M) of the By-Laws. NASDAQ OMX also proposes to include an exception to each of the aforementioned disclosure requirements for any disclosures with respect to the ordinary course business activities of any broker, dealer, commercial bank, trust company or other nominee who is a Proposing Person solely as a

<sup>25</sup> "Synthetic Equity Interest" shall mean any derivative, swap or other transaction (including any short positions, profit interest, options, warrants, convertible securities, stock appreciation or similar rights) or series of transactions engaged in, directly or indirectly, by a Proposing Person, the purpose or effect of which is to give the Proposing Person economic risk similar to ownership of shares of any class or series of NASDAQ OMX, including due to the fact that the value of such derivative, swap or other transaction or series of transactions is determined by reference to the price, value or volatility of any shares of any class or series of NASDAQ OMX, or which derivative, swap or other transaction or series of transactions provides, directly or indirectly, the opportunity to profit from any increase in the price or value of shares of any

## (c) Questionnaire, Representation and Agreement for Director-Nominees

NASDAQ OMX proposes to add a new Section 3.5 to its By-Laws to require nominees for director to deliver to NASDAQ OMX, in accordance with the time periods prescribed for delivery of a stockholder's notice: (i) A written questionnaire with respect to the background and qualifications of the nominee; and (ii) a written representation and agreement as to certain matters. Specifically, the written representation and agreement will provide that the nominee:

- Is not and will not become a party to (i) any agreement as to how the nominee will act or vote on any issue or question (a "Voting Commitment") that has not been fully disclosed to NASDAQ OMX or (ii) any Voting Commitment that could limit or interfere with the nominee's fiduciary duties under applicable law;
- is not and will not become a party to any agreement with any person other than NASDAQ OMX with respect to any direct or indirect compensation, reimbursement or indemnification in connection with service or action as a director of NASDAQ OMX that has not been fully disclosed to NASDAQ OMX;
- would be in compliance, if elected, and will comply, with the provisions of NASDAQ OMX's By-Laws relating to qualifications of directors, conflicts of interest and contracts and transactions involving directors; and
- in such proposed nominee's individual capacity and on behalf of any person on whose behalf the nomination is made, would be in compliance, if elected, and will comply, with NASDAQ OMX's Corporate Governance Guidelines, Board of Director Code of Conduct and Code of Ethics, including all applicable, publicly disclosed conflict of interest, confidentiality, stock ownership and insider trading policies and guidelines.

The requirements of proposed Section 3.5 of the By-Laws, which will apply to both the Company's and stockholders' nominees for director, will ensure that NASDAQ OMX has the necessary information about nominees to fulfill its public disclosure requirements. The requirements also will ensure that nominees will comply with the legal obligations, policies and procedures applicable to all NASDAQ OMX directors.

result of being the stockholder directed to prepare and submit the notice required by the By-Laws on behalf of a beneficial owner.

## (d) Removal and Replacement of Supermajority Voting Provisions

Consistent with the proposed amendments to remove and replace the supermajority voting provisions in the Charter discussed above, NASDAQ OMX proposes to amend each provision of the By-Laws that currently requires a supermajority vote of stockholders to instead require a "majority of votes outstanding." NASDAQ OMX's By-Laws currently include the following two supermajority voting requirements, each of which conforms with an analogous provision in the Charter.

- *Removal of Directors.* Section 4.6 provides that any or all of the directors may be removed from office at any time by the affirmative vote of at least 66⅔% of the total voting power of the Voting Stock, voting together as a single class.<sup>35</sup>
- *Adoption, Alteration, Amendment and Repeal of By-Laws.* Section 11.1 provides that the By-Laws may be altered amended or repealed, or new By-Laws may be adopted, at any meeting of the stockholders by the affirmative vote of the holders of at least 66⅔% of the voting power of the Voting Stock, voting together as a single class.<sup>36</sup>

To conform with the proposed changes to the Charter, NASDAQ OMX proposes to replace each of these supermajority voting requirements with a voting standard requiring the affirmative vote of a majority of the outstanding Voting Stock. As discussed above with respect to the analogous Charter amendments, NASDAQ OMX believes that a "majority of outstanding shares" standard reflects a balanced approach that responds to stockholder feedback while appropriately maintaining NASDAQ OMX's defensive posture against hostile takeovers.

## (e) Procedures for Filling Board Vacancies

Section 4.8 of the By-Laws sets forth the procedures to fill a director position that has become vacant, whether because of death, disability, disqualification, removal or resignation. Under the current provisions, if such a vacancy occurs, the Nominating & Governance Committee of the Board shall nominate, and the Board shall elect by majority vote, a person to fill the vacancy. In light of the addition of a right for stockholders to call a special meeting, as discussed above, NASDAQ OMX proposes amendments to Section

4.8 to state explicitly that vacancies on the Board are to be filled by a majority vote of the Board, and not by stockholders. In addition, to prescribe procedures in case multiple Board vacancies occur at the same time, the proposed amendments state that a Board vacancy shall be filled by the majority of the directors, even if there is less than a quorum, or by the sole remaining director, if there is only one director remaining on the Board. The proposed amendments do not change any of the other procedures for filling Board vacancies.

## (f) Use of Electronic Means for Certain Notices and Related Waivers

Currently, Section 4.12(a) of the By-Laws provides that notice of any meeting of the Board shall be deemed duly given to a director if, among other methods, the notice is sent to the director at the address last made known in writing to NASDAQ OMX by telegraph, telefax, cable, radio or wireless. Section 4.12(b) of the By-Laws provides that such notice of a board meeting need not be given to any director if waived by the director in writing or by electronic transmission (or by telegram, telefax, cable, radio or wireless and subsequently confirmed in writing or by electronic transmission). NASDAQ OMX proposes amendments to Sections 4.12(a) and (b) to provide that both notices and waivers of such notices can be given by email or other means of written electronic transmission. These amendments are intended merely to expand the means through which notices and waivers of notices may be given, and the amendments do not affect any of the other procedural requirements of Sections 4.12(a) and (b). In addition, the proposed amendments reflect current practices, as a substantial amount of communications between NASDAQ OMX and its directors, outside of Board meetings, occurs through electronic means.

## (g) Composition of the Management Compensation Committee

As required by the Dodd-Frank Wall Street Reform and Consumer Protection Act and Rule 10C-1 under the Exchange Act,<sup>37</sup> NASDAQ recently amended its listing rules relating to compensation committees.<sup>38</sup> Since NASDAQ OMX is

<sup>37</sup> See Public Law 111-203, 124 Stat. 1376 (2010) and 17 CFR 240.10C-1.

<sup>38</sup> See Securities Exchange Act Release No. 68640 (January 11, 2013), 78 FR 4554 (January 22, 2013) (SR-NASDAQ-2012-109). Among other things, the amendments require each NASDAQ-listed company, with certain exceptions, to have a



listed on NASDAQ, it must comply with these listing rules just like any other listed company. NASDAQ OMX therefore proposes amendments to Section 4.13(f) of the By-Laws, which relates to the composition of the Management Compensation Committee of NASDAQ OMX's Board, to conform to the recent amendments to NASDAQ's listing rules. Specifically, NASDAQ OMX proposes to state that the Management Compensation Committee must consist of at least two members and that each member shall meet the eligibility requirements set forth in the rules of The NASDAQ Stock Market.

#### (h) No Amendment or Repeal of Certain By-Law Amendments

While current Section 11.1 of the By-Laws provides for alteration, amendment, repeal and adoption of By-Laws by the stockholders, current Section 11.2 provides for alteration, amendment, repeal and adoption of By-Laws by the Board. These two sections operate as alternate means to alter, amend, repeal or adopt By-Laws. In other words, the stockholders may alter, amend, repeal or adopt By-Laws without any action by the Board, and vice versa. NASDAQ OMX proposes to add a proviso to Section 11.2 to state that no By-Law adopted by the stockholders shall be amended or repealed by the Board if the By-Law so adopted so provides. This is a stockholder-friendly provision that is intended to prevent the Board from subsequently overriding stockholder action to amend or repeal the By-Laws.

#### (i) Non-Substantive Changes

The remaining proposed By-Law amendments are non-substantive changes, which will simplify and streamline the document. Specifically, NASDAQ OMX proposes minor changes to Section 3.3 to incorporate the new defined term "Proposing Person," to use the term "nomination" rather than "nominee" for consistency and to correct two cross-references. NASDAQ OMX also proposes to delete obsolete references to the 3.75% Series A Convertible Notes due 2012 and the Series B Convertible Notes due 2012, which are no longer outstanding, in Section 12.7.

In addition, NASDAQ OMX proposes to correct typographical errors and/or delete obsolete cross-references in Article I(f), Section 4.3, Section 9.4(b), Section 12.5 and Section 12.6. Finally,

compensation committee of its board of directors, consisting of a minimum of two independent directors who meet additional eligibility requirements relating to compensatory fees and affiliation.

NASDAQ OMX proposes to renumber and reorganize the provisions of the By-Laws, where necessary following the other amendments.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>39</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>40</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.

In response to feedback from its investors, NASDAQ OMX is proposing changes to its Charter to replace each supermajority voting requirement with a "majority of outstanding shares" voting standard. NASDAQ OMX believes this approach will strike an appropriate balance between responding to stockholder feedback and protecting the Company and its investors against hostile takeovers. In addition, the clarifying changes to the Charter will protect investors by making the Charter more concise and easier to understand. Both sets of changes to the Charter were approved by NASDAQ OMX's investors at the most recent annual meeting of stockholders.

NASDAQ OMX also proposes to eliminate the Certificate of Designation relating to the Series A Convertible Preferred Stock, which is no longer outstanding. This proposed change will protect investors by enhancing the clarity of NASDAQ OMX's Charter.

Finally, NASDAQ OMX proposes changes to its By-Laws: (i) To implement a stockholder right to call a special meeting; (ii) to enhance the "advance notice" procedures; (iii) to require certain information and agreements from director-nominees; (iv) to remove and replace the supermajority voting provisions to conform to the Charter amendments; (v) to clarify the procedures for filling Board vacancies; (vi) to allow the use of electronic means for certain notices and waivers; (vii) to conform the composition requirements for the Management Compensation Committee of NASDAQ OMX's Board with the NASDAQ listing rules; (viii) [sic] to prevent the Board from amending or repealing By-Law amendments approved by the stockholders; and (ix) [sic] to make other non-substantive changes.

The proposals relating to the stockholder right to call a special

meeting and to remove and replace the supermajority voting requirements are responsive to feedback from NASDAQ OMX's stockholders. The additional procedural requirements relating to special and annual meetings will protect investors by stating clearly and explicitly the procedures stockholders must follow to propose business at such meetings. The requirement for certain information and agreements from director-nominees will enhance investor protection by ensuring that nominees provide adequate information about themselves and also comply with applicable law and certain NASDAQ OMX policies and procedures relating to the Board. The prohibition on the Board amending or repealing By-Law amendments approved by the stockholders is a stockholder-friendly provision that is intended to prevent the Board from subsequently overriding stockholders' wishes. Finally, the remaining changes are clarifying in nature, and they enhance investor protection by conforming NASDAQ OMX's governance documents to current practices and applicable rules and by making them clearer and easier to understand.

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

Because the proposed rule change relates to the governance of NASDAQ OMX and not to the operations of the Exchange, 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 45 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 or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

<sup>39</sup> 15 U.S.C. 78f(b).

<sup>40</sup> 15 U.S.C. 78f(b)(5).



#### 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2013-115 on the subject line.

##### *Paper Comments*

- 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-2013-115. This file number should be included on the subject line if email 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 Web site 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 offices 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-2013-115, and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>41</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2013-29609 Filed 12-11-13; 8:45 am]

**BILLING CODE 8011-01-P**

#### **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-71018]**

#### **Order Granting a Temporary Exemption Pursuant to Section 36(a)(1) of the Securities Exchange Act of 1934 From the Filing Deadline Specified in Rule 613(a)(1) of the Exchange Act**

December 6, 2013.

Rule 613(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act")<sup>1</sup> requires the Financial Industry Regulatory Authority, Inc. ("FINRA") and the eighteen registered national securities exchanges (collectively, the "SROs") to "jointly file on or before 270 days from the date of publication of the Adopting Release [for Rule 613 of the Exchange Act<sup>2</sup>] in the **Federal Register** a national market system plan to govern the creation, implementation, and maintenance of a consolidated audit trail and central repository as required by [the rule]." The Adopting Release for Rule 613 was published in the **Federal Register** on August 1, 2012,<sup>3</sup> thus requiring the national market system plan ("NMS plan") to be filed on or before April 28, 2013.<sup>4</sup> On March 7, 2013, the Securities and Exchange Commission ("Commission") granted a request from the SROs for a temporary exemption from this deadline until December 6, 2013.<sup>5</sup> On November 8, 2013, the SROs filed an application, pursuant to Rule 0-12 under the Exchange Act,<sup>6</sup> to request the Commission to grant a temporary exemption under Section 36 of the Exchange Act,<sup>7</sup> from the deadline specified in Rule 613(a)(1) of the Exchange Act<sup>8</sup> for submitting the NMS

plan to the Commission until September 30, 2014.<sup>9</sup>

In their Current Request Letter, the SROs explain that on February 26, 2013, they published a Request for Proposal ("RFP") to solicit bids from which they will select an entity to serve as the consolidated audit trail ("CAT") plan processor to build, operate, administer, and maintain the CAT.<sup>10</sup> Thirty-one firms, including four distinct SRO groups, initially indicated that they planned to submit bids on the RFP.<sup>11</sup> The SROs further state in the Current Request Letter that following the publication of the RFP, potential bidders and members of the public, including broker-dealer members of the SROs, expressed interest in the process by which the SROs will review and evaluate bids, narrow down the list of bids, use those bids in formulating the CAT NMS Plan, and, ultimately, select the CAT plan processor.

The SROs state in the Current Request Letter that they solicited views from potential bidders regarding whether they preferred to know the process the SROs will follow to review, evaluate, and select a bidder in advance of submitting their bids and whether that process could influence either a decision regarding whether to submit a bid or the contents of a bid. The SROs represent that many potential bidders indicated that knowing the process by which the SROs will choose the plan processor is important to finalizing their bids. According to the SROs, the potential bidders also generally expressed the view that providing bidders with four weeks between approval of a selection process and the submission deadline for the bids would be an appropriate timeframe to allow bidders to make any changes to their bids in light of the approved evaluation and selection process. Based on this

<sup>9</sup> See Letter from Robert L.D. Colby, Executive Vice President and Chief Legal Officer, FINRA, to Elizabeth M. Murphy, Secretary, Commission, dated November 7, 2013 (the "Current Request Letter").

<sup>10</sup> In the February 7, 2013 Letter, the SROs stated that an RFP process was necessary prior to filing an NMS plan pursuant to Rule 613 ("CAT NMS Plan"). The SROs explained their belief that such a process would ensure that potential alternative solutions for creating the consolidated audit trail could be presented to the SROs for their consideration, and would provide the SROs with information necessary to prepare a detailed cost/benefit analysis as required by Rule 613. See February 7, 2013 Letter, *supra* note 5.

<sup>11</sup> According to the SROs, since that time, seven firms have formally notified the SROs of their intent to withdraw as primary bidders. See Current Request Letter, *supra* note 9. Of the seven firms that formally notified the SROs of their intent to withdraw as primary bidders, two are SRO groups. See <http://catnmsplan.com/web/groups/catnms/@catnms/documents/appsupportdocs/p217583.pdf> (last visited November 19, 2013).

<sup>1</sup> 17 CFR 242.613(a)(1).

<sup>2</sup> 17 CFR 242.613.

<sup>3</sup> Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (August 1, 2012) ("Adopting Release").

<sup>4</sup> April 28, 2013, was a Sunday. Therefore, in accordance with Rule 160(a) of the Commission Rules of Practice, the deadline for filing the NMS plan was Monday, April 29, 2013.

<sup>5</sup> See Securities Exchange Act Release No. 69060, 78 FR 15771 (March 12, 2013); and letter from Robert L.D. Colby, Executive Vice President and Chief Legal Officer, FINRA, to Elizabeth M. Murphy, Secretary, Commission, dated February 7, 2013 ("February 7, 2013 Letter").

<sup>6</sup> 17 CFR 240.0-12.

<sup>7</sup> 15 U.S.C. 78mm.

<sup>8</sup> 17 CFR 242.613(a)(1).

<sup>41</sup> 17 CFR 200.30-3(a)(12).