

have been addressed in modifications to the original proposal.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which NYSE consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2008-46 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.
- All submissions should refer to File Number SR-NYSE-2008-46. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days

between the hours of 10 a.m. and 3 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-NYSE-2008-46 and should be submitted on or before August 13, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>145</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58175; File No. SR-Phlx-2008-12]

### Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Granting Approval to a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to an Exemption From Examination Requirements for Off-Floor Traders

July 16, 2008.

On April 14, 2008, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to amend Phlx Rule 604(e)(iii) to modify the category of persons who are exempt from the requirement that Off-Floor Traders<sup>3</sup> complete the Series 7 General Securities Registered Representative Examination ("Series 7"). On May 30, 2008, Phlx filed Amendment No. 1 to the proposed rule change.<sup>4</sup> The proposal was published for comment in the

<sup>145</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> Phlx Rule 604(e)(i) defines an off-floor trader as a "person who is compensated directly or indirectly by a member or participant organization for which the Exchange is the DEA [Designated Examining Authority], or any other associated person of such member or participant organization, and who executes, makes trading decisions with respect to, or otherwise engages in proprietary or agency trading of securities, including, but not limited to, equities, preferred securities, convertible debt securities or options off the floor of the Exchange."

<sup>4</sup> Amendment No. 1 replaced and superseded the original filing in its entirety.

**Federal Register** on June 12, 2008.<sup>5</sup> The Commission received no comments on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

Phlx states that the Series 7 exemption meant to apply to persons who traded on its equity trading floor and were associated with either a specialist organization or a floor brokerage organization that executed orders on an agency basis ("Former Floor Participants"). When Phlx replaced its equity trading floor with XLE, an electronic trading system, certain persons became Off-Floor Traders by definition, and consequently subject to the requirement to pass the Series 7. Phlx did not intend for this category of persons to be subject to the Series 7 requirement. Therefore, Phlx proposed to exempt these persons from the Series 7 by expanding the exemption in Rule 604 to include Market Maker Authorized Traders (MMATs) and Off-Floor Traders who only handle and/or make trading decisions regarding agency orders and any bona fide errors related to those agency orders.

Phlx believes the proposed rule change will make the administration of the Series 7 requirements for Off-Floor Traders more efficient, because under the current rule, the exemption applies to persons "primarily engaged" in submitting orders to XLE or making trading decisions with respect to XLE, which requires the Former Floor Participant and the Exchange's enforcement staff to make a judgment call. Under the proposed rule, however, an XLE participant needs to register with the Exchange in order to be an MMAT, so the determination of MMAT status is straightforward. In addition, Phlx staff can examine what type of orders (agency or proprietary) Off-Floor Traders handle for net capital purposes and could identify whether Off-Floor Traders would qualify for the proposed exemption. Finally for the same reasons, the proposed rule change should improve Phlx's enforcement efforts, because Phlx and its members will be able to more easily determine which persons are subject to the Series 7 requirement.

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

<sup>5</sup> See Securities Exchange Act Release No. 57923 (June 4, 2008), 73 FR 33479 (June 12, 2008).

a national securities exchange.<sup>6</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>7</sup> which requires, among other things, that the rules of an exchange be 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, to protect investors and the public interest. The Commission believes that this proposed rule change will better capture the floor-based activities of Former Floor Participants by focusing on the status of, or type of, activity performed by those persons. In addition, it should provide a clearer standard that should allow Exchange staff, as well as members and individuals, to better determine who is subject to the Series 7 requirement. This should make the administration, as well as compliance and enforcement, of the Series 7 requirement more efficient.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>8</sup> that the proposed rule change (SR-Phlx-2008-12), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58179; File No. SR-Phlx-2008-31]

### Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Amendments No. 1 and 2 Thereto, Relating to Changes to Phlx's Governing Documents in Connection With the Acquisition of Phlx by The NASDAQ OMX Group, Inc.

July 17, 2008.

#### I. Introduction

On April 21, 2008, the Philadelphia Stock Exchange, Inc. ("Phlx" or

"Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change in connection with the acquisition of the Exchange by The Nasdaq Stock Market, Inc., now known as The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). On April 29, 2008, the proposed rule change was published for comment in the **Federal Register**.<sup>3</sup> The Exchange filed Amendment Nos. 1 and 2 to the proposed rule change on May 30, 2008 and July 2, 2008, respectively.<sup>4</sup> The Commission received no comments on the proposed rule change.

This order provides notice of filing of Amendment No. 2 to the proposed rule change, and grants accelerated approval to the proposed rule change, as modified by Amendments Nos. 1 and 2.

#### II. Background

On November 7, 2007, NASDAQ OMX announced that it had entered into an agreement with the Exchange, pursuant to which NASDAQ OMX would acquire all of the common stock of the Exchange.<sup>5</sup> Phlx shareholders would receive cash consideration for their common stock and would not retain any ownership interest in the Exchange.

The proposed acquisition would be effected through the merger of Pinnacle Merger Corporation, Inc. ("Merger

Subsidiary"), a Delaware corporation and wholly-owned subsidiary of NASDAQ OMX, with and into the Exchange, with the Exchange surviving the merger (the "Merger").<sup>6</sup> The members of the board of directors of Merger Subsidiary would be selected by NASDAQ OMX from among the current Governors of the Exchange and would become the Board of Governors of Phlx ("Board") immediately after the effective time of the Merger.<sup>7</sup> The Exchange represents that the directors of Merger Subsidiary, and therefore the new Board, would satisfy the compositional requirements of the new Board, discussed below.<sup>8</sup>

After the Merger, the Exchange would be a wholly-owned subsidiary of NASDAQ OMX.<sup>9</sup> NASDAQ OMX would operate the Exchange as a separate self-regulatory organization ("SRO"). Accordingly, Phlx would maintain its current registration as a national securities exchange, and maintain separate rules, membership rosters, and listings that would be distinct from the rules, membership rosters, and listings of NASDAQ OMX's other national securities exchanges. Additionally, after the Merger, the Exchange would continue to operate the Stock Clearing Corporation of Philadelphia ("SCCP"),<sup>10</sup> its wholly-owned clearing agency, and The Philadelphia Board of Trade ("PBOT"), its wholly-owned futures exchange subsidiary. Separately, NASDAQ OMX also entered into an agreement with the Boston Stock Exchange, Inc. ("BSE"), pursuant to which NASDAQ OMX would acquire all of the outstanding membership interests in BSE ("BSE Acquisition").<sup>11</sup> Following the closing of the BSE Acquisition and the Merger, NASDAQ OMX will be the sole owner of five SROs: NASDAQ Exchange, BSE, the

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

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

<sup>3</sup> See Securities Exchange Act Release No. 57703 (April 23, 2008), 73 FR 23293 ("Notice").

<sup>4</sup> In Amendment No. 1, Phlx represented that, on May 6, 2008, the Exchange obtained shareholder approval of the proposed rule change, as required by Delaware General Corporation Law, and that no further action by the Exchange in connection with the proposed rule change is required. See also General Instruction E to Form 19b-4 (concerning completion of action by a self-regulatory organization on a proposed rule change). Phlx also clarified that routing by NASDAQ Execution Services, LLC ("NES") to Phlx, on behalf of The NASDAQ Stock Market LLC ("NASDAQ Exchange"), takes two forms. Amendment No. 1 is technical in nature, and therefore is not subject to notice and comment.

In Amendment No. 2, Phlx filed the complete Certificate of Incorporation and amended By-Laws of NASDAQ OMX in order to propose their adoption as rules of Phlx. The By-Laws contained minor amendments to terminology to apply to Phlx all of the same provisions that are currently specifically applicable to the NASDAQ Exchange. The amended By-Laws were published for comment in a separate NASDAQ Exchange filing. See Securities Exchange Act Release No. 57761 (May 1, 2008), 73 FR 26182 (May 8, 2008) (notice of SR-NASDAQ-2008-035) ("Nasdaq Stock Market Proposal").

<sup>5</sup> The Exchange demutualized in 2004, though it is not publicly traded. See Securities Exchange Act Release No. 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR-PHLX-2003-73) (approval order).

<sup>6</sup> See proposed Section 1-1(ii) of the By-Laws (defining "NASDAQ OMX Merger").

<sup>7</sup> See proposed Section 4-3(b) of the By-Laws and Notice, *supra* note 3, 73 FR at 23295.

<sup>8</sup> See *infra* notes 61-69 and accompanying text (discussing proposed compositional requirements of the Board).

<sup>9</sup> The Exchange would have a single class of common stock, all of which would be held by NASDAQ OMX.

<sup>10</sup> See Securities Exchange Act Release No. 58180 (July 17, 2008) (SR-SCCP-2008-01) (approving changes to SCCP's articles of incorporation, including language clarifying that all of the authorized shares of SCCP common stock are issued and outstanding and are held by Phlx).

<sup>11</sup> See Securities Exchange Act Release No. 57757 (May 1, 2008), 73 FR 26159 (SR-BSE-2008-23) (notice of proposed rule change related to BSE Acquisition); Securities Exchange Act Release No. 57782 (May 6, 2008), 73 FR 27583 (May 13, 2008) (SR-BSECC-2008-01) (notice of proposal to amend the articles of organization and by-laws of the BSECC to reflect its proposed acquisition by NASDAQ OMX).

<sup>6</sup> 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).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</sup> 17 CFR 200.30-3(a)(12).