

including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2011-003 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-NASDAQ-2011-003. 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 Web site viewing and printing in the Commission's Public Reference Room 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-NASDAQ-2011-003, and should be submitted on or before February 2, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

Elizabeth M. Murphy,
Secretary.

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**SECURITIES AND EXCHANGE
COMMISSION**

[Release No. 34-63647; File No. SR-Phlx-2010-148]

**Self-Regulatory Organizations;
NASDAQ OMX PHLX LLC; Order
Granting Approval of a Proposed Rule
Change Relating to Certain
Membership Rules Including
Affiliations and Lapse of Membership
Applications**

January 5, 2011.

I. Introduction

On November 5, 2010, NASDAQ OMX PHLX LLC ("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")¹ and Rule 19b-4 thereunder,² a proposed rule change relating to certain membership rules. The proposed rule change was published for comment in the **Federal Register** on November 22, 2010.³ The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

A. Affiliations

Currently, Phlx Rule 793 ("Affiliations—Dual or Multiple") allows a person that holds a Phlx trading permit to associate or affiliate with one or more Phlx members or a non-member that is engaged in the securities business if such affiliation is approved in writing by the member and disclosed to the Exchange.⁴ However, no member may use his or her trading permit to qualify more than one member organization. Further, the rule provides that the Exchange could disapprove multiple affiliations that the Exchange believed were "inconsistent with Exchange standards of financial responsibility, operational capability, or compliance responsibility."

Among other things, Rule 793 allows a broker-dealer to seek an affiliation in order to obtain membership status

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 63318 (November 16, 2010), 75 FR 71155 ("Notice").

⁴ Specifically, the rule provides that "[n]o person shall at the same time be a partner, * * * officer, director, stockholder, or associated person of more than one member or participant organization, nor shall he be affiliated in any manner with a non-member or non-participant organization which is engaged in the securities business, unless such affiliation has been disclosed to and approved in writing by the member and/or participant organizations and such approval has been filed with the Office of the Secretary."

without the need to secure a membership seat (or, subsequent to the Exchange's demutualization, a trading permit). Such an arrangement would have been appropriate, for example, where a broker-dealer sought only electronic access to the Exchange, since the Exchange only requires one permit to qualify a member organization. Another example would be applicable in the case of access to the Phlx trading floor. Because Phlx requires each person associated with a member organization on the trading floor who functions in a trading capacity to have a permit, and every trader on the floor must possess a Series A-1 permit,⁵ affiliation could allow floor traders to affiliate with another member organization to satisfy certain trading or staffing requirements.

The Exchange now proposes to eliminate Rule 793. In its place, the Exchange proposes to amend existing Rule 908 ("Rights and Privileges of A-1 Permits") to add a new paragraph (b)(i) to allow a trading permit holder on the Exchange's floor to affiliate with up to two member organizations that are under common ownership. Specifically, the proposed rule provides that: "[n]otwithstanding applicable By-Laws and Rules conditioning membership, a Series A-1 permit holder on the Exchange's trading floor may be affiliated with up to two (2) member organizations (a primary and a secondary member organization) that are under common ownership * * *." The proposed rule would define "common ownership" to be at least 75% common ownership between the member organizations. Further, both the primary and secondary member organizations would need to notify the Phlx Membership Department of the affiliation, and such notification must include an attestation of common ownership, the names of the individuals responsible for supervision of the permit holder, and the Exchange account numbers for billing purposes. Under the proposed rule, a Series A-1 permit holder would have the ability to engage in trading activity on the Exchange's floor on behalf of either the primary or secondary member organization that the permit is affiliated with per Rule 908(b)(i).⁶

Despite the ability to affiliate with up to two member organizations, the

⁵ For example, a Series A-1 permit holder is required to display a badge when on the trading floor that identifies the member organization on whose behalf the trader is trading that day. A Series A-1 permit holder may not trade for more than one member organization on the same day.

⁶ A Series A-1 permit holder may not trade for more than one member organization on the same day.

proposal provides that a Series A-1 permit holder would be required to comply with all current membership By-Laws and Rules. Further, both the permit holder and the affiliated member organizations also must comply with all applicable trading, registration, qualification, examination, and other membership requirements. In particular, the Series A-1 permit holder is required to obtain and maintain all necessary qualifications (including examinations) and registrations. In addition, the Series A-1 permit holder would be required to disclose to the Exchange the individuals at each member organization (both the primary and secondary member organization) that are responsible for supervising the Series A-1 permit holder.

As a consequence of the proposal, any Series A-1 permit holder that currently affiliates with an unrelated party would not be permitted to continue to qualify that member organization. In addition, a permit holder would not be permitted to maintain an affiliation with more than two member organizations, and both organizations must be under common ownership.

In recognition of the proposed deletion of Rule 793 and new Rule 908(b)(i), the Exchange also proposed to make conforming changes to other rules that reference affiliation. In particular, the Exchange proposed to amend Option Floor Procedure Advice ("OFPA") F-9 to conform to new Rule 908(b)(i).⁷ In addition, the Exchange would remove references to "dual affiliation" in OFPA F-11 and Regulation 3 in favor of a reference simply to "affiliation," and would replace a reference to Rule 793 with Rule 908 in OFPA F-11. The Exchange further would amend Rule 908(h) to add an "or" to the text of the rule to make clear that a permit may be transferred either intra-firm or to an inactive nominee registered with the Exchange.

B. Lapsed Applications

In addition, the Exchange proposes to amend Rule 900.2 to address lapsed membership applications. Pursuant to Exchange Rule 900.2, applicants

⁷ In particular, the Exchange proposed in F-9 to remove references to "dual" so that the rule simply refers to affiliations; to require reports of affiliations to be sent to the Membership Department instead of the Exchange's Office of the Secretary to conform with the text of amended Rule 908; replace the reference to Rule 793, which is being deleted, with a reference to Rule 908; amend the language in OFPA F-9 to remove the requirements to explain compensation since affiliations would only be permitted for organizations that are under common ownership; and add a sentence indicating that floor members must adhere to the requirements in renamed (a) and (b), and to reference Exchange Rule 1020 for the newly named F-9(ii)(a).

desiring membership in the Exchange are required to submit information in a form prescribed by the Membership Department.⁸ According to the Exchange, after a 90 calendar day period has elapsed, the information provided by the applicant is stale and no longer provides a reliable or reasonable basis for the Exchange to make a determination on admitting a person for membership.⁹ The Exchange represented that the Membership Department expends a considerable amount of resources requesting updates from members and researching information to make a reasonable determination when an application is outdated.¹⁰

To address this situation, the Exchange proposed to amend Exchange Rule 900.2¹¹ to require persons seeking membership to the Exchange to provide all information and respond to subsequent requests from the Membership Department for information within a 90 calendar day period. Any failure to respond in the prescribed period would result in the application lapsing. If an application lapses, the person would be required to submit a new application if it wants to continue with its application.¹² Upon a showing of good cause, the Exchange may extend the timeframe.¹³ The Exchange would not refund the fee associated with submitting an application and the applicant would be required to pay a new fee to resubmit the application if it chooses to proceed with its application for membership.¹⁴

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the

⁸ The Membership Department posts the requisite forms on the Exchange's Web site at http://www.nasdaqomxtrader.com/Trader.aspx?id=membership_phlx. The Membership Department updates the forms from time to time and makes them available on this Web site.

⁹ See Notice, *supra* note 3, at 71157.

¹⁰ See *id.*

¹¹ The Commission notes that the Exchange proposed to renumber Rule 900.2(e) as 900.2(f) due to the new proposed Rule 900.2(e).

¹² The purpose of the new application would be to update all information to provide the Membership Department with current information on which to base a decision to accept the applicant for membership. The Exchange expressed its intent to file a proposal with the Commission to amend its Fee Schedule to reflect the lapsed application fee.

¹³ See Notice, *supra* note 3, at 71157. The Exchange also may extend the time period when it makes a request for additional information relatively close to the 90-day deadline. See *id.*

¹⁴ The Exchange's Application Fee can be found on the Fee Schedule located on the Exchange's Web site at <http://www.nasdaqomxtrader.com/content/marketregulation/membership/phlx/feesched.pdf>.

rules and regulations thereunder applicable to a national securities exchange,¹⁵ and, in particular, the requirements of Section 6(b) of the Act¹⁶ and the rules and regulations thereunder. Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,¹⁷ in that the proposal promotes just and equitable principles of trade, prevents fraudulent and manipulative acts, removes impediments to and perfects the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest.

The Commission believes the proposal, which limits the ability of a Series A-1 permit holder to qualify other organizations for Exchange membership is reasonable, as it will continue to allow flexibility in permitting a permit holder to qualify up to one other member organization (the "secondary member organization") for Exchange membership that is under common ownership with the primary member organization with which the permit holder is associated. While the Commission notes that based on the proposal, a Series A-1 permit holder who currently affiliates with an unrelated member organization (not under common ownership) to qualify the member organization for electronic access or access to the trading floor would not be permitted to continue to qualify that member organization, the Commission believes that the proposal is a reasonable alternative that may assist firms in addressing staffing issues for entities under a common ownership that conduct a floor-based trading business.

The Exchange's proposal recognizes the changed environment in terms of the means by which persons obtain access to the Exchange. Current Rule 793 was adopted when the Exchange was a membership organization and access was obtained through ownership of a limited number of seats on the Exchange. Rule 793 allows persons to access and trade on the Exchange that might not have otherwise been able to purchase or obtain a membership seat. However, since it demutualized, the Exchange now offers access via an unlimited number of trading permits, which can be more readily obtained by qualified individuals compared to former membership seats. In this respect, the Exchange's proposal

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

¹⁶ 15 U.S.C. 78f(b).

¹⁷ 15 U.S.C. 78f(b)(5).

modernizes the affiliation provision in recognition of the transition of the Exchange from a mutual to a demutualized organization.

Furthermore, the Commission notes that the Exchange represented in its proposal, as described above, that the Exchange would continue to have access to information on an affiliation necessary to carry out its regulatory responsibility with respect to the member organizations and their affiliated persons. Further, an affiliation would not excuse a person from any of the Exchange's By-Laws and rules governing membership. Notably, both the permit holder and the affiliated member organizations must comply with all applicable registration, qualification, examination, and other membership requirements, and the permit holder must continue to obtain and maintain all necessary qualifications (including examinations) and registrations. Further, the Series A-1 permit holder must disclose to the Exchange the individuals at each member organization (both the primary and secondary member organization) that are responsible for supervising the Series A-1 permit holder. The Commission believes that these provisions are designed to ensure compliance with applicable membership rules and should assure the Exchange's oversight of any affiliation.

In addition, the Commission believes that the Exchange's proposed conforming changes to OFPA F-9, F-11, and Regulation 3 appropriately reflect the proposed deletion of Rule 793 and the new provision in Rule 908(b)(i). Separately, the Commission believes that the proposal to amend the language in Rule 908(h) should provide Exchange members with clarity as to the transfer of permits.

Finally, the Commission believes that requiring applicants for Phlx membership to respond to requests for documentation or additional information within a 90 calendar day period, absent a showing of good cause, is reasonable and should provide the Exchange's Membership Department up-to-date information that it can utilize to make decisions concerning membership applications. The 90-day response period and subsequent lapse of an application for non-response should encourage prompt replies by applicants to Exchange requests for information and documentation and should assure that the Exchange has reliable and current information on which to base membership decisions.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁸ that the proposed rule change (SR-Phlx-2010-148) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Elizabeth M. Murphy,
Secretary.

[FR Doc. 2011-435 Filed 1-11-11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63654; File No. SR-Phlx-2010-158]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Granting Approval of Proposed Rule Change Establishing a \$5 Strike Price Program

January 6, 2011.

I. Introduction

On November 12, 2010, NASDAQ OMX PHLX LLC ("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")¹ and Rule 19b-4 thereunder,² a proposed rule change to allow the Exchange to list and trade option series with strike price intervals of \$5 or greater where the strike price is more than \$200 in up to five option classes on individual stocks. The proposed rule change, as amended, was published for comment in the **Federal Register** on November 24, 2010.³ The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

Phlx has proposed to modify Commentary .05 to Exchange Rule 1012 to allow the Exchange to list and trade series in intervals of \$5 or greater where the strike price is more than \$200 in up to five option classes on individual stocks ("\$5 Strike Price Program"). Currently, Exchange Rule 1012 at Commentary .05 permits strike price intervals of \$10 or greater where the strike price is \$200 or more.⁴ The

proposal would allow the Exchange to list series in intervals of \$5 or greater where the strike price is more than \$200 in up to five option classes on individual stocks.

In support of its proposal, Phlx stated that it believes the proposed \$5 Strike Price Program would provide investors increased opportunities to improve returns and manage risk in the trading of equity options that overlie high priced stocks. In addition, the Exchange believes the proposed \$5 Strike Price Program would allow investors to establish equity options positions that are better tailored to meet their investment, trading, and risk management requirements.

Phlx further stated that it has analyzed its capacity and represented that the Exchange and the Options Price Reporting Authority have the necessary systems capacity to handle the potential additional traffic associated with the listing and trading of new series associated with the \$5 Strike Price Program.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁵ Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,⁶ which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, 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.

As the Exchange notes, the proposal should provide investors with added flexibility in the trading of options on high-priced securities and allow investors to establish options positions that are more precisely tailored to meet their investment objectives. The Commission believes that the proposal strikes a reasonable balance between the Exchange's desire to accommodate market participants by offering a wider array of investment opportunities and the need to avoid unnecessary proliferation of options series and the

greater than \$25 but less than \$200; and \$2.50 or greater where the strike price is \$25 or less.

⁵ 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).

⁶ 15 U.S.C. 78f(b)(5).

¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 63339 (November 18, 2010), 75 FR 71771 ("Notice").

⁴ Commentary .05 also permits strike price intervals of \$5 or greater where the strike price is