

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-64122; File No. SR-Phlx-2011-03)

March 24, 2011

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Amendment to Rule 862 Relating to Discretionary Proxy Voting on Executive Compensation Matters

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹, and Rule 19b-4 thereunder,² notice is hereby given that on March 16, 2011, 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 and II 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 and is approving the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, pursuant to Section 19(b)(1) of the Act³ and Rule 19b-4 thereunder,⁴ proposes to amend Phlx Rule 862 (Proxies at Direction of Owner) to prohibit member organizations from voting on matters related to executive compensation, or any other significant matter, as determined by the Securities and Exchange Commission ("Commission") by rule unless instructed by the beneficial owner of the shares.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(1).

⁴ 17 CFR 240.19b-4.

The text of the proposed rule change is available on the Exchange's Website at <http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings>, 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 III 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

Exchange Rule 862 provides instructions on how the proxies are voted. A member organization may give a proxy to vote stock provided that:

- (1) it has transmitted proxy-soliciting material to the beneficial owner of stock;
- (2) it has not received voting instructions from the beneficial owner by the date specified in the statement accompanying such material; and
- (3) provided such action is adequately disclosed to stockholders and does not include authorization for a merger, consolidation or any matter which may substantially affect the rights or privileges of such stock.

The purpose of the proposed rule change is to amend Exchange Rule 862(2)(b) to prohibit member organizations from voting on matters related to executive compensation, or any other significant matter, as determined by the Commission, unless instructed by the beneficial owner of the shares. On July 21, 2010, the President signed the Dodd-Frank Wall Street Reform and

Consumer Protection Act (the “Dodd-Frank Act”). Section 957 of the Dodd-Frank Act adopted new Section 6(b)(10) of the Act.⁵ This new provision requires all national securities exchanges to adopt rules that prohibit their members from voting on the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission, unless the member receives voting instructions from the beneficial owner of the shares.

On August 18, 2010, the Exchange filed amendments to Rule 862 to, in part, eliminate broker discretionary voting for all elections of directors at shareholder meetings, whether contested or not, except for companies registered under the Investment Company Act of 1940 (the “1940 Act”), provided that it is not the subject of counter solicitation.⁶

To further assure compliance with the newly adopted Section 6(b)(10), the Exchange proposes to add a new Item 21 and accompanying commentary to Exchange Rule 862(2)(b) to provide that in no event could a member organization vote shares on matters regarding executive compensation, or any other significant matter, as determined by the Commission, unless instructed by the beneficial owner of the shares. The proposed commentary to Item 21 would clarify that a matter relating to executive compensation would include, among other things, the items referred to in Section 14A of the Exchange Act (added by Section 951 of the Dodd-Frank Act), including (i) an advisory vote to approve the compensation of executives, (ii) a vote on whether to hold such an advisory vote every one, two or three years, and (iii) an advisory vote to

⁵ 15 U.S.C. 78f(b)(10).

⁶ See Securities Exchange Act Release No. 62775 (August 26, 2010), 75 FR 53725 (September 1, 2010)(SR-Phlx-2010-115).

approve any type of compensation (whether present, deferred, or contingent) that is based on or otherwise relates to an acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of an issuer and the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of the executive officer. In addition, a member organization may not give or authorize a proxy to vote without instructions on a matter relating to executive compensation, even if such matter would otherwise qualify for an exception from the requirements of Item 12, Item 13 or any other Item under Exchange Rule 862(2)(b). Any vote on these or similar executive compensation-related matters would be subject to the requirements of Exchange Rule 862.

The Exchange's proposal also includes commentaries to Items 12 and 13 to provide guidance that a member organization may not give or authorize a proxy to vote without instructions on a matter relating to executive compensation, even if such matter would otherwise qualify for an exception from the requirements of Item 12, Item 13 or any other Item under Rule 862, and further provides a reference to Item 21.

The Exchange is proposing to add the words "or authorize" in the following places to clarify that the rule includes not only the giving of a proxy but the authorization of such proxy:

1. Exchange Rule 862(2)(b); and
2. Exchange Rule 862(2)(b)(20).

The Exchange also made necessary clerical changes in the following manner:

1. Item 19 deletes the colon and the word "or" at the end of the paragraph, and adds a semi-colon; and
2. Item 20 deletes a period at the end of the paragraph, and adds a semi-colon and the word "or".

Similar changes have already been made at the New York Stock Exchange, Inc. (“NYSE”) and The Nasdaq Stock Market LLC (“NASDAQ”)⁷. Amending Exchange Rule 862 similarly continues to provide consistency among the exchanges to eliminate disparities regarding proxy voting, as well as complies with Section 6(b)(10) of the Act.⁸

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁹ in general and with Section 6(b)(10) of the Act,¹⁰ in particular. Section 6(b)(10) requires that a national securities exchange’s rules must prohibit any member that is not the beneficial owner of a security registered under Section 12 from granting a proxy to vote the security in connection with a shareholder vote on, among other things, executive compensation matters, or any other significant matter, as determined by the Commission. The proposed rule change will adopt the prohibition required by Section 6(b)(10).

Section 6(b)(5) requires that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and 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

⁷ See NYSE Rule 452, Securities Exchange Act Release No. 34-62874 (September 9, 2010), 75 FR 56152 (September 15, 2010)(SR-NYSE-2010-59); and NASDAQ Rule 2251, Securities Exchange Act Release No. 34-62992 (September 24, 2010), 75 FR 60844 (October 1, 2010)(SR-NASDAQ-2010-114).

⁸ 15 U.S.C. 78f(b)(10).

⁹ 15 U.S.C. 78f.

¹⁰ 15 U.S.C. 78f(b)(10).

proposed rule change is consistent with this requirement in that it will protect investors and the public interest by adopting the requirements of Section 957 of the Dodd-Frank Act.

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

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. 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. Please include File Number SR-Phlx-2011-03 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR- Phlx -2011-03. 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 website (<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 website 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 office of Phlx. 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 publicly available. All submissions should refer to File Number SR- Phlx -2011-03 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

In its filing, the Exchange requested that the Commission approve the proposal on an accelerated basis. The Exchange stated that it believed good cause existed to grant accelerated approval because Section 957 of the Dodd-Frank Act does not provide for a transition period.

After careful consideration, 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.¹¹ The Commission believes that the proposal is consistent with Section 6(b)(10)¹² of the Act, which requires that national securities exchanges adopt rules prohibiting members that are not beneficial holders of a security from voting uninstructed proxies with respect to the election of a member of the board of directors of an issuer (except for

¹¹ In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹² 15 U.S.C. 78f(b)(10).

uncontested elections of directors for companies registered under the Investment Company Act), executive compensation, or any other significant matter, as determined by the Commission, by rule. The Commission also believes that the proposal is consistent with Section 6(b)(5)¹³ of the Act, which provides, among other things, that the rules of the Exchange must be designed to promote just and equitable principles of trade, 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, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposal is consistent with Section 6(b)(10) of the Act because it adopts revisions that comply with that section. As noted in the accompanying Senate Report, Section 957, which adopts Section 6(b)(10), reflects the principle that “final vote tallies should reflect the wishes of the beneficial owners of the stock and not be affected by the wishes of the broker that holds the shares.”¹⁴ The proposed rule change will make Phlx rules compliant with the new requirements of Section 6(b)(10) by prohibiting broker-dealers, who are not beneficial owners of a security, from voting uninstructed shares with respect to any matter on executive compensation or any other significant matter, as determined by the Commission by rule.¹⁵

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ See S. Rep. No. 111-176, at 136 (2010).

¹⁵ As noted above, Section 6(b)(10) also prohibits broker voting for director elections, except for uncontested director elections of registered investment companies. PHLX already prohibits broker voting in director elections except for uncontested director elections for registered investment companies. See Phlx Rule 862(2)(b)(19) and note 6 supra; see also note 16 infra. As to other matters, the Commission has not, to date, adopted rules concerning other significant matters where uninstructed broker votes should be prohibited, although it may do so in the future. Should the Commission adopt

The Commission believes that the proposal is consistent with Section 6(b)(5) of the Act because the proposal will further investor protection and the public interest by assuring that shareholder votes on executive compensation matters are made by those with an economic interest in the company, rather than by a broker that has no such economic interest, which should enhance corporate governance and accountability to shareholders.¹⁶

The Commission notes that Phlx's new rule prohibiting uninstructed broker votes on executive compensation covers the specific items identified in Section 951 of the Dodd-Frank Act, as well as any other matter concerning executive compensation, and has been drafted broadly to reflect the requirements of Section 6(b)(10) of the Act. The proposed rule language also specifically states that a broker vote on any executive compensation matter would not be permitted even it would otherwise qualify for an exception from any item under Rule 862. The Commission believes this provision will make clear that any past practice or interpretation that may have permitted a broker vote on an executive compensation matter, under existing rules, will no longer be applicable and is superseded by the newly adopted provisions.

Finally, the Commission notes that the change to reflect that Phlx rules prohibit not only the giving of a proxy, but also the authorization of the proxy, should help to clarify the intent of Phlx proxy rules and is consistent with the requirements of Section 6 of the Act.

Based on the above, the Commission believes that the Phlx's proposal will further the purposes of Sections 6(b)(5) and 6(b)(10) of the Act by ensuring that brokers, holding shares on

such rules, we would expect PHLX to adopt coordinating rules promptly to comply with the statute.

¹⁶ As the Commission stated in approving NYSE rules prohibiting broker voting in the election of directors, having those with an economic interest in the company vote the shares, rather than the broker who has no such economic interest, furthers the goal of enfranchising shareholders. See Securities Exchange Act Release No. 60215 (July 1, 2009), 74 FR 33293 (July 10, 2009) (SR-NYSE-2006-92).

behalf of beneficial owners, are not voting uninstructed shares on matters relating to executive compensation, which should enhance corporate accountability to shareholders. The rule filing should also serve to fulfill the Congressional intent in adopting Section 6(b)(10) of the Act.

The Commission also finds good cause, pursuant to Section 19(b)(2) of the Act,¹⁷ for approving the proposed rule change prior to the 30th day after the date of publication of notice in the Federal Register. As noted above, Section 6(b)(10) of the Act, enacted under Section 957 of the Dodd-Frank Act, does not provide for a transition phase, and requires rules of national securities exchanges to prohibit, among other things, broker voting on executive compensation. The Commission believes that good cause exists to grant accelerated approval to the Exchange's proposal, because it will conform Phlx Rule 862 to the requirements of Section 6(b)(10) of the Act. Moreover, the Commission notes that the proposed changes are based on NYSE Rule 452.¹⁸

¹⁷ 15 U.S.C. 78s(b)(2).

¹⁸ See supra note 7

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁹ that the proposed rule change (SR- Phlx -2011-03) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Cathy H. Ahn
Deputy Secretary

¹⁹ 15 U.S.C. 78s(b)(2).

²⁰ 17 CFR 200.30-3(a)(12).