



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-87211; File No. SR-Phlx-2019-38]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Phlx’s Second Amended Limited Liability Company Agreement and By-Laws

October 3, 2019

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 September 20, 2019, Nasdaq 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.

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

The Exchange proposes to amend its Second Amended Limited Liability Company Agreement (“LLC Agreement”) and By-Laws (“By-Laws”), as further discussed below

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaqphlx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

The Exchange proposes to amend its LLC Agreement and By-Laws to (i) harmonize certain provisions related to the regulatory independence of the Exchange with those of the Exchange’s affiliates, Nasdaq ISE, LLC (“ISE”), Nasdaq GEMX, LLC (“GEMX”), and Nasdaq MRX, LLC (“MRX”), (ii) modify Director categorizations, (iii) update compositional requirements of the Regulatory Oversight Committee (“ROC”), and (iv) make additional, non-substantive edits. Each change is discussed below.

LLC Agreement

The Exchange proposes to modify a number of provisions in its LLC Agreement related to the regulatory independence of the Exchange. As discussed below, the Exchange believes that the proposed changes will make these provisions more robust and will serve to align the Exchange’s LLC Agreement with the LLC Agreements of its affiliates, ISE, GEMX, and MRX.

- Distributions: The Exchange currently has distribution provisions in Section 14 of the LLC Agreement that prohibits the Exchange from making distributions to its stockholder (i.e., Nasdaq, Inc.), using Regulatory Funds.³ The Exchange now proposes to amend this

³ “Regulatory Funds” means fees, fines, or penalties derived from the regulatory operations of the Exchange. “Regulatory Funds” shall not be construed to include revenues derived from listing fees, market data revenues, transaction revenues, or any other aspect of the

provision to substantively conform to Section 15 in the ISE, GEMX, and MRX LLC Agreements by specifying that Regulatory Funds shall not be used for non-regulatory purposes, but rather shall be used to fund the legal, regulatory and surveillance operations of the Exchange. The Exchange believes these are minor changes that make the distribution provisions more robust by specifying how Regulatory Funds may be used. Lastly, the Exchange proposes to add that it would not be required to make a distribution to the stockholder if such distribution would otherwise be required to fulfill the regulatory functions or responsibilities of the Exchange.

- Books and Records: Section 15 of the LLC Agreement presently sets forth certain information relating to general administrative matters with respect to the books and records of the Exchange, including requirements as to where the Exchange's books and records are kept, the maintenance of such books and records, and inspection rights, among other provisions. The Exchange proposes to amend Section 15 to add substantively conforming language as set forth in Section 16 of the LLC Agreements of ISE, GEMX, and MRX by providing that all confidential information relating to the self-regulatory function of the Exchange (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of the Exchange shall: (i) not be made available to any persons other than to those officers, directors, employees and agents of the Exchange that have a reasonable need to know the contents thereof, (ii) be retained in confidence by the Exchange and the officers, directors, employees and agents of the Exchange, and (iii) must not be used for any non-regulatory purpose. Furthermore, the Exchange proposes to add, similar to the ISE, GEMX, and MRX LLC Agreements, that nothing in the LLC Agreement shall be interpreted as to limit or impede the rights of the Commission to access and examine such confidential information pursuant to federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any officers, directors, employees or agents of the Exchange to disclose such confidential information to the Commission. The Exchange believes that the proposed changes will add more specificity as to who may access the Exchange's books and records, especially relating to confidential information on the self-regulatory function of the Exchange, and the use of such information.
- Assignments: Section 20 of the LLC Agreement currently prohibits the Exchange's stockholder from transferring or assigning in whole or in part its limited liability company interest in the Exchange, except to an affiliate of the stockholder. The Exchange now proposes to provide in Section 20 that any transfer or assignment by the stockholder of its equity ownership interest in the Exchange is prohibited unless it is filed and approved by the Commission pursuant to a rule filing, and to delete the stockholder affiliate exception to the general prohibition on transfers and assignments. This will align Section 20 of the Exchange's LLC Agreement with Section 20 in the LLC Agreements of ISE, GEMX, and MRX.

commercial operations of the Exchange, even if a portion of such revenues are used to pay costs associated with the regulatory operations of the Exchange. See By-Law Article I, Section (ii). The definition of Regulatory Funds is not changing under this proposal.

By-Law Article I

Currently, the definition of “Non-Industry Director” in the Exchange By-Laws refers to, among other individuals, an officer, director or employee of an issuer of securities listed on the national securities exchange operated by the Exchange.⁴ Because only its affiliate, The Nasdaq Stock Market LLC (“Nasdaq”), currently operates an equities listing market, the Exchange seeks to amend the definition of Non-Industry Director to refer to an officer, director or employee of an issuer of securities listed on a national securities exchange operated by the Exchange or one of its affiliates. The Exchange believes that the proposed changes will bring greater clarity to the Exchange’s rules by aligning the By-Law provision to how the Exchange currently operates. The Exchange notes that the qualifications for a Non-Industry Director are not expanding under this proposal and as a practical matter, no changes to the current composition of Non-Industry Directors on the Exchange’s Board are contemplated by this rule change. Today, a Non-Industry Director who is not designated by the Exchange as a Public Director⁵ under (i) of the definition of Non-Industry Director, and that does not explicitly fall under (ii) (i.e., “an officer, director or employee of an issuer of securities listed on the national securities exchange operated by the Exchange”) would still fall under (iii) an individual who would not be an Industry Director.⁶

⁴ In addition, the term “Non-Industry Director” encompasses a Director (excluding Staff Directors) who is a Public Director or any other individual who would not be an Industry Director. See By-Law Article I, Section (bb).

⁵ The term “Public Director” shall mean a Director who has no material business relationship with a broker or dealer, the Exchange or its affiliates, or FINRA. See By-Law Article I, Section (gg).

⁶ The term “Industry Director” means a Director (excluding any two officers of the Exchange, selected at the sole discretion of the Board, amongst those officers who may be serving as Directors (the “Staff Directors”)), who (i) is or has served in the prior three years as an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer; (ii) is an officer, director (excluding an outside director), or employee of an entity that owns more than ten percent of the equity of a broker or dealer, and the broker or dealer

With the proposed changes, these Non-Industry Directors could fall under both (ii) and (iii) because they would be representative of issuers listed on the Exchange's affiliate, Nasdaq, and at the same time, not be considered Industry Directors. The Exchange also proposes to make conforming changes to the definition of a "Non-Industry member" of a committee.⁷ The Exchange further proposes a non-substantive change to delete the reference to "director" contained in (ii) of the definition of Non-Industry member in order to align with its affiliated exchanges.⁸

Currently, the Exchange's Board compositional requirements require at least one Public Director and at least one Director representative of issuers and investors.⁹ As set forth in Article I, Section (gg), a "Public Director" is defined as a Director who has no material business

accounts for more than five percent of the gross revenues received by the consolidated entity; (iii) owns more than five percent of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed ten percent of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (iv) provides professional services to brokers or dealers, and such services constitute 20 percent or more of the professional revenues received by the Director or 20 percent or more of the gross revenues received by the Director's firm or partnership; (v) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50 percent or more of the voting stock of a broker or dealer, and such services relate to the director's, officer's, or employee's professional capacity and constitute 20 percent or more of the professional revenues received by the Director or member or 20 percent or more of the gross revenues received by the Director's or member's firm or partnership; or (vi) has a consulting or employment relationship with or provides professional services to the Exchange or any affiliate thereof or to FINRA (or any predecessor) or has had any such relationship or provided any such services at any time within the prior three years. See By-Law Article I, Section (p).

⁷ See By-Law Article I, Section (cc).

⁸ In particular, the definitions of Non-Industry member on Nasdaq BX, Inc. ("BX"), Nasdaq, ISE, GEMX, and MRX all refer to, among other individuals, "...an officer or employee of an issuer of securities..." See BX By-Law Article I, Section (cc); Nasdaq By-Law Article I, Section (w); ISE By-Law Article I, Section (x); GEMX By-Law Article I, Section (x); and MRX By-Law Article I, Section (x).

⁹ See By-Law Article III, Section 3-2(a).

relationship with a broker or dealer, the Exchange or its affiliates, or FINRA. “Director representative of issuers and investors” is not defined specifically in the Exchange’s By-Laws, but is implicitly defined in the term Non-Industry Director as “an officer, director, or employee of an issuer of securities listed on the national securities exchange operated by the Exchange.”¹⁰ The Exchange now proposes to clarify in the definition of Public Director that, for the avoidance of doubt, a director of an issuer of securities listed on a national securities exchange operated by the Exchange or one of its affiliates shall not be precluded from being considered a Public Director solely on the basis of such directorship. The Exchange believes that a director of a listed company can adequately represent the interests of listed companies on the Board and therefore be considered an issuer representative. At the same time, the Exchange does not believe that such a directorship always constitutes a material business relationship with a broker or dealer, the Exchange or its affiliates, or FINRA, which would prohibit the individual from being considered a Public Director.¹¹ Of course, such issuer representative must still meet the requirements of a Public Director and not have such material business relationships by definition. Thus in limited circumstances, the Exchange believes that it is possible for directors of listed companies to be considered both Public Directors and issuer representatives.

The Exchange does not seek to amend the Board’s qualification requirements in the By-Laws other than the proposed changes to the definitions of Non-Industry Director and Public

¹⁰ See By-Law Article I, Section (bb). As discussed above, the Exchange will amend this provision to refer to “an officer, director, or employee of an issuer of securities listed on a national securities exchange operated by the Exchange or one of its affiliates.”

¹¹ This is consistent with the longstanding best practice of the Exchange’s parent, Nasdaq, Inc., having the Chairman of the Audit Committee of the board of directors of Nasdaq, Inc. serve as the Chairman of the Exchange Board’s Regulatory Oversight Committee, which is required to be comprised of Public Directors who are also considered “independent directors” as defined in Nasdaq Rule 5605. See By-Law Article V, Section 5-2(c). Because Nasdaq, Inc. is a listed company, this Exchange Director could be considered both an issuer representative and a Public Director.

Director. With the proposed changes, the composition of the Board would still be required to reflect a balance among Non-Industry Directors (including Public Directors and Directors representative of issuers and investors), Industry Directors, and Member Representative Directors.¹² Accordingly, current Board qualification requirements such as the number of Non-Industry Directors, including at least one Public Director and at least one Director representative of issuers and investors, equaling or exceeding the sum of the number of Industry Directors and Member Representative Directors would continue to apply.¹³

In light of the foregoing, the Exchange also proposes to make conforming changes to the definition of a “Public member” of a committee.¹⁴ Lastly, the Exchange proposes to add that a Public member means a committee member that has no material business relationship with FINRA (in addition to a broker or dealer, or the Exchange and its affiliates, as currently provided). This proposed change would align the Exchange’s definition of “Public member” to its affiliated exchanges.¹⁵

¹² The term “Member Representative Director” shall mean a Director who has been elected or appointed after having been nominated by the Member Nominating Committee or by a Member pursuant to the Exchange’s By-Laws. A Member Representative Director may, but is not required to be, an officer, director, employee, or agent of a Member. See By-Law Article I, Section (w). Member Representative Directors are directors that meet the fair representation requirement in Section 6(b)(3) of the Act, which requires that the “rules of the Exchange assure a fair representation of its members in the selection of its directors and administration of its affairs...”

¹³ See By-Law Article III, Section 3-2(a). In addition, the Board qualification requirement that at least 20% of the Directors be Member Representative Directors will continue to apply. See LLC Agreement Section 8(a).

¹⁴ See By-Law Article I, Section (hh).

¹⁵ See BX By-Law Article I, Section (hh); Nasdaq By-Law Article I, Section (z); ISE By-Law Article I, Section (aa); GEMX By-Law Article I, Section (aa); and MRX By-Law Article I, Section (aa).

By-Law Article V, Section 5-2(c)

Currently, By-Law Article V, Section 5-2(c) requires that the ROC be comprised of three members, each of whom shall be a Public Director and an “independent director” as defined in Nasdaq Rule 4200. The Exchange proposes to amend Section 5(c) to provide that the ROC shall be comprised of at least three members, as is currently set forth in the ROC Charter.¹⁶ All members of the ROC will continue to be Public Directors and “independent directors.” Lastly, the Exchange also proposes to make technical changes in Section 5-2(c) to update the reference to Nasdaq Rule 4200 to Rule 5605.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁷ in general, and furthers the objectives of Section 6(b)(1), Section 6(b)(3), and Section 6(b)(5) of the Act,¹⁸ in particular, which require, among other things, an exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act; that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer; and that the rules of an exchange be 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.

LLC Agreement

The Exchange believes that the proposed changes to the LLC Agreement provisions on distributions, books and records, and assignments are consistent with the Act. As discussed

¹⁶ The ROC Charter is available at: <http://ir.nasdaq.com/static-files/ad0a0102-e977-40cf-8139-15c359576a25>.

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 15 U.S.C. 78f(b)(1), (b)(3), and (b)(5).

above, the Exchange believes that its proposal will bring greater specificity and detail to provisions related to the regulatory independence of the Exchange. The Exchange believes that the proposed changes will make clear the independence of the Exchange's regulatory function and facilitate the ability of the Exchange to carry out its responsibility and operate in a manner consistent with the Act. Furthermore, the proposed amendments will have the additional benefit of bringing the Exchange's LLC Agreement into greater conformity with those of ISE, GEMX, and MRX, thereby creating more consistent standards among the affiliated exchanges owned by Nasdaq, Inc.¹⁹

By-Law Article I

The Exchange believes that the changes to the definitions of Non-Industry Director and Non-Industry member proposed above will enhance the clarity of these provisions given that only the Exchange's affiliate (Nasdaq) currently operates an equities listing market. Accordingly, the proposed changes should more accurately reflect how the Exchange currently operates. The Exchange also believes that the proposed changes to the definitions of Public Director and Public member are consistent with the Act as these modifications are intended to make clear that a Director is not barred from being considered a Public Director merely because the Director serves as a director of an issuer of securities listed on a national securities exchange operated by the Exchange or one of its affiliates, and are consistent with current corporate governance practices.²⁰ Furthermore, as discussed above, the requirements that the number of Non-Industry Directors (including at least one Public Director and at least one Director representative of issuers and investors) equal or exceed the sum of the number of Industry Directors and Member Representative Directors, and at least 20% of the Directors be Member

¹⁹ See ISE, GEMX, and MRX LLC Agreements, Sections 15, 16, and 20.

²⁰ See supra note 11.

Representative Directors, would continue to apply.²¹ Accordingly, the Exchange believes that the proposed changes will more accurately reflect the Exchange's current operations and governance practices while continuing to comport with the Exchange's statutory obligations regarding fair representation under Section 6(b)(3) of the Act. Lastly, the proposed changes in "Non-Industry member" and "Public member" as discussed above will bring these definitions in greater conformity with the Exchange's affiliated exchanges, thereby creating more consistent standards among the affiliated exchanges owned by Nasdaq, Inc.

By-Law Article V, Section 5-2(c)

The Exchange believes that the proposed rule change in By-Law Article V, Section 5-2(c) to provide that the ROC shall be comprised of at least three members is consistent with the Act because it will promote transparency to the Exchange's current practices by conforming the By-Law language to the ROC Charter. As discussed above, the composition requirements that all ROC members be Public Directors and "independent directors" as defined in Nasdaq's Rules will remain unchanged with this proposal, thereby ensuring that an independent Board committee will continue to be responsible for the regulatory oversight of the Exchange. Lastly, the proposed technical change to update the reference to Nasdaq Rule 4200 to Rule 5605 will bring greater clarity to the Exchange's rules, which will protect investors and the public interest.

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

Because the proposed rule change relates to the corporate governance of the Exchange and not to the Exchange's operations, 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.

²¹ See supra notes 12 and 13, with accompanying text.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act²² and subparagraph (f)(6) of Rule 19b-4 thereunder.²³

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act²⁴ normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)²⁵ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay. The Commission notes that waiver of the operative delay would allow the Exchange to effect the changes to its LLC Agreement and By-Laws, which would provide more specificity and would better align provisions in the Exchange's LLC Agreement with those in the LLC Agreements of its affiliates, in time for the Exchange Board meeting on September 25, 2019. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the

²² 15 U.S.C. 78s(b)(3)(A).

²³ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

²⁴ 17 CFR 240.19b-4(f)(6).

²⁵ 17 CFR 240.19b-4(f)(6)(iii).

Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.²⁶

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or 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. Please include File Number SR-Phlx-2019-38 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-Phlx-2019-38. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

²⁶ For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2019-38 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁷

Jill M. Peterson,

Assistant Secretary.

²⁷ 17 CFR 200.30-3(a)(12).

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