SECURITIES AND EXCHANGE COMMISSION

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Designation of a Longer Period for Consideration of the Proposed Rule Change
Action on Proposed Rule Change to Rule 14.11(i), Managed Fund Shares, To List and Trade the Shares of the Elkhorn S&P GSCI Dynamic Roll Commodity ETF of Elkhorn ETF Trust

February 17, 2016.


The Commission has not received any comments on the proposal. Section 19(b)(2) of the Act 4 provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is February 18, 2016. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider this proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act, 5 designates April 1, 2016, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–BATS–2015–105).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority. 6
Robert W. Errett, Deputy Secretary.

SECURITIES AND EXCHANGE COMMISSION

Self-Regulatory Organizations; Boston Stock Exchange Clearing Corporation; Stock Clearing Corporation of Philadelphia; NASDAQ OMX BX, Inc.; The NASDAQ Stock Market LLC; NASDAQ OMX PHXL LLC; Order Approving Proposed Rule Changes, as Modified by Amendments Thereto, To Amend the By-Laws of NASDAQ, Inc.

February 17, 2016.

I. Introduction

On December 21, 2015, each of the Boston Stock Exchange Clearing Corporation (“BSECC”), Stock Clearing Corporation of Philadelphia (“SCCP”), NASDAQ OMX BX, Inc. (“BX”), The NASDAQ Stock Market LLC (“NASDAQ”), and NASDAQ OMX PHXL LLC (“Phlx”) and, together with BSECC, SCCP, BX, and NASDAQ, the “SROs”), 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 proposed rule changes with respect to the By-Laws (“By-Laws”) of NASDAQ, Inc. (“Company”), the parent company of the SROs. The proposed rule changes would revise certain requirements regarding Director 3 qualifications and Director disqualification procedures for the Company’s Board of Directors (“Board”). On December 29, 2015, each SRO filed Amendment No. 1 to its respective proposal. 4 On December 30, 2015, Phlx filed Amendment No. 2 to its proposal. 5 The proposed rule changes, as modified by the amendments thereto, were published for comment in the Federal Register on January 7, 2016. 6 The Commission did not receive any comment letters on the proposals. This order approves the proposed rule changes, as modified by the respective amendments thereto.

II. Description of the Proposal

The Company proposes to amend certain provisions of the By-Laws that relate to the qualification of Directors. First, the Company proposes to amend Section 4.3 of the By-Laws (Qualifications), which sets forth the compositional requirements of the Board. Currently, Section 4.3 requires that the number of Non-Industry Directors 7 on the Board equal or exceed

4 “Director” means a member of the Company’s Board of Directors. See Article I of the By-Laws.
5 Amendment No. 1 for technical reasons and, subsequently, filed Amendment No. 2. Amendment No. 2 amended and replaced the original filing in its entirety. In Amendment No. 1, each SRO, among other things, clarified the operation of the current and proposed provisions of the By-Laws and how the proposed rule change would operate in conjunction with the Listing Rules (as herein defined) of NASDAQ.
6 On December 30, 2015, Phlx withdrew Amendment No. 1 for technical reasons and, subsequently, filed Amendment No. 2. Amendment No. 2 amended and replaced the original filing in its entirety.
8 Under the By-Laws, “Non-Industry Director” or “Non-Industry committee member” means a Director (excluding any Staff Director) or committee member who is (1) a Public Director or Public committee member; (2) an Issuer Director or Issuer committee member; or (3) any other individual who would not be an Industry Director or Industry committee member. See Article I(g) of the By-Laws.
the number of Industry Directors, and that the Board include (1) at least two Public Directors; (2) at least one, but no more than two, Issuer Directors; and (3) no more than one Staff Director, unless the Board consists of ten or more Directors, in which case the Board shall include no more than two Staff Directors.

The Company proposes to amend Section 4.3 to state that the Board may, rather than shall, include at least one, but no more than two, Issuer Directors. Thus, the proposal would allow, but no longer require, the Board to include an Issuer Director. The SROs state that, while the Company highly values the views of its listed companies, the Company does not believe that it is necessary to have an Issuer Director on its own Board to represent those views. The SROs state that issues relating to listed companies are generally the province of NASDAQ and its board of directors, rather than the Company and its Directors, and that NASDAQ's board includes issuer representation, as mandated by NASDAQ's by-laws. Additionally, the SROs state that the Company's Directors are experienced and capable enough to handle issues relating to listed companies that may arise without specifically having an Issuer Director on the Board. Second, the Company proposes to amend Section 4.7 of the By-Laws (Disqualification), which addresses the disqualification of a Director due to a change in that Director's classification. Specifically, Section 4.7 provides that the term of office of a Director shall terminate immediately upon a determination by the Board, by a majority vote of the remaining Directors, that: (a) The Director no longer satisfies the classification for which the Director was elected; and (b) the Director's continued service as such would violate the compositional requirements of the Board set forth in Section 4.3 of the By-Laws.

The Company proposes to amend Section 4.7 to allow the Board to elect to defer determinations under Section 4.7 regarding Director disqualification until the next annual meeting of stockholders. In addition, the proposals would amend Section 4.7 to provide that, if the Board elects to defer such determinations, neither the Board nor any committee of the Board would be deemed to be in violation of Section 4.3 or 4.13 of the By-Laws as a result of such deferral. The SROs state that the nominee selection process for Directors is long and complex and the Board cannot act quickly to replace a Director whose classification has changed. The SROs state that the proposed amendment to Section 4.7 would allow the Board to continue to make informed, deliberate decisions regarding Director nominees, rather than require it to act quickly in a way that is not in the best interest of the Company’s stockholders. In addition, the SROs state that the proposed rule changes would provide the Board with the option to retain Directors whose classification has changed but whose continued service is otherwise beneficial to the Board, the Company, and its stockholders. Further, the SROs state that the proposed amendment to Section 4.7 is designed to prevent the significant disruption that the SROs believe would occur if the Board had to replace a Director between annual meetings of stockholders.

The SROs represent that the provisions of the Company’s By-Laws that relate to Director classifications are completely distinct from the listing rules of NASDAQ (“Listing Rules”) and that the proposed rule changes do not affect in any way the Company’s obligation, as an issuer listed on NASDAQ, to comply with the Listing Rules, and that the Company will continue to comply with the Listing Rules, including provisions relating to corporate governance, following the effectiveness of the proposed By-Law amendments.

III. Discussion and Commission’s Findings

After careful review, the Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, in the case of the proposals by BX, NASDAQ, and Phlx (collectively, the “Exchanges”), and to a clearing agency, in the case of the proposals by BSECC and SCCP.

The Commission finds that the proposed rule changes by the Exchanges to amend the By-Laws are consistent with the requirements of Section 6 of the Act and the rules and regulations thereunder applicable to a national securities exchange.
Board were forced to replace a Director between annual meetings.\textsuperscript{28} Based on the foregoing, the Commission finds that the proposed rule changes filed by BX, NASDAQ, and Phlx are consistent with the Act. The Commission also finds that the proposed rule changes by BSECC and SCCP are consistent with the requirements of the Act and the rules and regulations thereunder applicable to clearing agencies. Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to protect investors and the public interest.\textsuperscript{29} In addition, Rule 17Ad–22(d)(8) under Section 17Ad–22(d)(8) of the Act requires registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures reasonably designed to have governance arrangements that are clear and transparent.\textsuperscript{30} Here, BSECC and SCCP filed proposed rule changes to highlight changes being made to the By-Laws of the Company,\textsuperscript{31} which indirectly owns BSECC and SCCP. Therefore, the proposed rule changes by BSECC and SCCP help make clear and transparent the governance arrangements of the Company and, thus, BSECC and SCCP, which helps ensure investor protection and the public interest.

The Commission notes that the Company, as an issuer listed on NASDAQ, will continue to be required to comply with NASDAQ's Listing Rules, including the provisions in the Listing Rules relating to Corporate Governance Requirements, which requirements may differ from the By-Laws. The SRs have represented that the Company will continue to comply with the Listing Rules following the effectiveness of the proposed By-Law amendments.\textsuperscript{32} The Commission further notes that the Listing Rules provide generally that a majority of the directors of a listed issuer must be "independent" as defined in those rules and that a listed issuer's audit, compensation, and nominations committees must be composed solely of directors who are "independent."\textsuperscript{33} Because the Company's securities are listed on NASDAQ, the Commission notes that, when deferring determinations regarding Director disqualification pursuant to revised Section 4.7 of the By-Laws, the Company also must take into account the Listing Rules, including the "cure periods" contained therein, if the Director is serving in the capacity of an "independent director" within the meaning of the Listing Rules.

IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule changes, as modified by the amendments thereto, are consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, in the case of BX, NASDAQ, and Phlx, and to a registered clearing agency, in the case of BSECC and SCCP.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,\textsuperscript{34} that the proposed rule changes (SR–BSECC–2015–002; SR–SCCP–2015–02; SR–BX–2015–083; SR–NASDAQ–2015–160; SR–Phlx–2015–113), as modified by the amendments thereto, be, and hereby are, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.\textsuperscript{35}

Robert W. Errett,
Deputy Secretary.

[PR Doc. 2016–03669 Filed 2–22–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION


Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Partial Amendment No. 1 and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Partial Amendment No. 1, To Adopt FINRA Rule 6191(b) and Amend FINRA Rule 7440 To Implement the Data Collection Requirements of the Regulation NMS Plan To Implement a Tick Size Pilot Program

February 17, 2016.

I. Introduction

On November 13, 2015, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

\textsuperscript{23} Certain provisions of the Company's By-Laws are considered rules of BX, NASDAQ, and Phlx if they are stated policies, practices, or interpretations, as defined in Rule 19b–4 under the Act, of BX, NASDAQ, and Phlx, and must be filed with the Commission pursuant to Section 19(b) of the Act and Rule 19b–4 thereunder. 15 U.S.C. 78s(b); 17 CFR 240.19b–4.


\textsuperscript{25} See Notices, supra note 6.

\textsuperscript{26} Id.

\textsuperscript{27} Id.