

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56700; File No. SR-Phlx-2007-78)

October 24, 2007

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Article FOURTH of its Restated Certificate of Incorporation

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 October 5, 2007, the Philadelphia Stock Exchange, Inc. (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange pursuant to Section 19(b)(3)(A)(iii) of the Act³ and Rule 19b-4(f)(3) thereunder.⁴ The Exchange has designated this proposal as one concerned solely with the administration of the Exchange, which renders the proposal effective upon filing with the Commission. 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

Phlx proposes to amend its Restated Certificate of Incorporation (“Certificate”) by modifying the definition of “Related Persons” in Article FOURTH. The text of the proposed rule change is available at the Exchange, on the Exchange’s Web site at http://www.phlx.com/exchange/phlx_rule_fil.html, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(3).

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

As discussed further below, the Exchange represents that the purpose of the proposed rule change is to amend the definition of “Related Persons” as it appears in Article FOURTH of the Certificate to remove unnecessary burdens on the flexibility of the Exchange and its shareholders in effecting certain types of lawful fundamental transactions. The Exchange believes that this should facilitate appropriate deliberation, discussion, and activities by the shareholders of the Exchange in relation to fundamental transactions and other appropriate matters, without compromising the policies underlying the concentration limits on voting and ownership of Common Stock of the Exchange contained in Article FOURTH of the Certificate.

Article FOURTH of the Certificate imposes limitations on ownership and voting by holders of Phlx’s Common Stock.⁵ For purposes of applying these limitations, the holdings of a

⁵ The concentration limits in the Certificate limit any person, either alone or together with its Related Person, to (i) owning 40% of the outstanding Common Stock of the Exchange (20% in the case of Exchange members), and (ii) exercising voting rights in respect of more than 20% of the Common Stock. A waiver by the Board of Governors, subject to Commission approval, is permitted in certain cases. See Article FOURTH (b)(iii) and (v).

Phlx shareholder are combined with those of the shareholder's "Related Persons." Clause (b)(iii)(B) of Article FOURTH provides, in pertinent part, that:

. . . "Related Persons" shall mean (1) with respect to any Person,⁶ all "affiliates" and "associates" of such Person (as such terms are defined in Rule 12b-2 under the Securities Exchange Act of 1934, as amended (the "Exchange Act")), (2) with respect to any natural person constituting a "member" (as such term is defined in the Exchange Act) of the Corporation, any broker or dealer with which such member is associated and (3) any two or more Persons that have any agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, holding, voting or disposing of shares of Common Stock.
(Footnote added).

The Exchange notes that ownership and voting concentration limits are intended to ensure that the Exchange's management is not beset with conflicts of interest for the benefit of a small number of individuals or entities such that the Exchange cannot meet the statutory standards for national securities exchanges set forth in Sections 6⁷ and 19⁸ of the Act.⁹ The

⁶ In Article FOURTH (a)(iv), "Person" is defined as an individual, partnership (general or limited), joint-stock company, corporation, limited liability company, trust or unincorporated organization, and a government or agency or political subdivision thereof.

⁷ 15 U.S.C. 78f.

⁸ 15 U.S.C. 78s.

⁹ See Securities Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126 (December 8, 2004) (proposed SRO governance rulemaking). The organizational documents of other national securities exchanges contain similar concentration limits. See Securities Exchange Act Release Nos. 45803 (April 23, 2002), 67 FR 21306 (April 30, 2002) (SR-ISE-2002-01) (approving the restructuring of International Securities Exchange, Inc. from a limited liability company to a corporation); and 49718 (May 17, 2004), 69 FR 29611 (May 24, 2004) (SR-PCX-2004-08) (approving the demutualization of the former Pacific Exchange, Inc.). See also Securities Exchange Act Release Nos. 49067 (January 13, 2004), 64 FR 2761 (January 21, 2004) (SR-BSE-2003-19) (approving

Exchange believes that the “Related Persons” definition is intended to keep members and other persons from evading the numerical limits of holding shares in multiple affiliates or by having secret agreements with other shareholders whereby their “true” level of ownership, control, or voting power indirectly exceeds the permitted percentage limits.

Phlx is of the view that the policy underlying these restrictions was not intended to inhibit the Exchange or shareholders from effecting certain kinds of fundamental, and otherwise lawful, transactions, such as effecting an initial public offering or a merger or from entering into agreements or arrangements that are necessary or directly related to the execution of such transactions.¹⁰

Moreover, Phlx does not believe that the concentration limits or the “Related Persons” definition were intended to have the effect of limiting discussions among shareholders of any sort as they relate to the business of the Exchange or other matters of concern to the shareholders. In order to structure a fundamental transaction in a manner that is mutually beneficial to all parties, management and shareholders need the freedom to discuss various aspects of the transaction without the threat of these initial discussions triggering sub-clause (3) of the “Related Person” definition, thereby potentially causing the shareholders who are party to such discussions to exceed their permitted ownership and/or voting limits.

the operating agreement of the Boston Options Exchange); and 54399 (September 1, 2006), 71 FR 53728 (September 12, 2006) (SR-ISE-2006-45) (granting accelerated approval of the establishment of ISE Stock Exchange, LLC as a facility of the International Securities Exchange, Inc.).

¹⁰ Indeed, such fundamental transactions have been consummated, and are currently contemplated, by other national securities exchanges. In these cases, charter provisions of such exchanges similar to those in Article FOURTH of the Certificate were deleted or amended to accommodate specific transactions, such as when the Pacific Exchange was acquired by Archipelago Holdings. See Securities Exchange Act Release 50170 (August 9, 2004), 69 FR 50419 (August 16, 2004) (SR-PCX-2004-56); see also International

The proposed amendment is intended to (i) provide that certain ordinary agreements, arrangements or understandings in connection with potential fundamental transactions of the type described above are expressly permitted, and (ii) negate any inference that discussions or other communications among shareholders affecting the interests of the shareholders or the Exchange, as they relate to such transactions or certain other matters (that are not otherwise exempted under the definition), would cause shareholders to be regarded as “Related Persons.”

a. Exempted Matters

The proposed amendment would exclude from the scope of the “Related Persons” definition any agreement, arrangement, or understanding pertaining to any of the following: a merger, sale, acquisition, or other corporate affiliation of or by the Exchange or any subsidiary; the sale of all or substantially all of the assets of the Exchange; the issuance, offer, or sale by the Exchange and/or one or more shareholders (whether in one or more public or private transactions) of Common Stock of the Exchange.

The purpose of this language is to provide that certain types of ordinary and customary agreements and arrangements in connection with potential fundamental transactions, such as those described above, do not cause such shareholders to be “Related Persons.” These would include, for example, underwriting agreements relating to an initial public offering, merger agreements, asset purchase agreements, lock-up and standstill agreements, and voting agreements in connection with an acquisition.

The Exchange believes that if these types of agreements cannot be entered into without causing existing shareholders to be regarded as “Related Persons” (and thereby causing the aggregation of their shareholdings to prohibited levels), then Phlx will be severely hampered in

Securities Exchange Holdings, Inc. Form 8-K, Item 5.02 (Accession Number 1193125-7-96585 (April 30, 2007)).

its ability to proceed to structure and negotiate an otherwise lawful, fundamental transaction of the type described above. However, the proposal is intended to narrowly define certain types of transactions about which agreements, arrangements, and understandings may be concluded without causing the shareholders that are party thereto to be regarded as “Related Persons.” The Phlx believes that the legitimate policy concerns that are safeguarded by the current voting and ownership limitations in the Exchange’s Certificate continue to be addressed, because Article FOURTH would still treat as “Related Persons,” persons who are parties to agreements that are formed for any reason that is outside of the defined list of exempted transactions and certain related preparatory agreements (see discussion below).¹¹

b. Certain Preparatory Activities

The proposal will also exempt from the “Related Persons” definition certain agreements, arrangements, or understandings that relate to preparations for effecting fundamental transactions, including the preparation, filing with the Commission, or dissemination of a registration, proxy, or information statement in respect of any of the matters or transactions described in the Exempted Matters section above and any proposal or plan to do any of the foregoing, and any step that is required for, or specifically and directly related thereto.

¹¹ Of course, if a fundamental transaction were to proceed, the concentration limits and related procedures set forth in Article FOURTH would apply to any shareholder or prospective shareholder of the Exchange, unless the Certificate is further amended or the Exchange is not the surviving entity in the case of a merger. In these latter cases, any proposed amendment or any proposed new or successor Certificate would need to be filed with the Commission. See Sections 3(a)(27) (defining “rules of an exchange” to include the certificate of incorporation or “instruments corresponding to the foregoing”) and 19(b) (specifying procedures pertaining to filing and approval of self-regulatory organizations’ rules and proposed rule changes) of the Act, 15 U.S.C. 78c(a)(27) and 78s(b)(1). Thus, the protections afforded by the concentration limits would not be diluted in the case of a fundamental transaction.

The above language is intended to cover activities relating to the preparations, plans, and or steps required for, or specifically and directly related to, the types of fundamental transactions described above. This clause expands the scope of activities that are proposed to be permitted without triggering the “Related Persons” definition. However, the proposal clearly defines the scope of activities that can be engaged in and cannot serve as a subterfuge for members or affiliates or other shareholders to join together to use their ownership or voting rights to attempt to manage the day-to-day operations of the Exchange to their benefit and disadvantage of others or to deny access to the facilities of the Exchange.

c. Discussions of Other Communications

This proposed amendment is also intended to clarify that certain communications among shareholders affecting the interests of the shareholders or the Exchange (other than those relating to transactions or activities that are otherwise exempted under the proposal) will not be presumed to constitute an “agreement, arrangement, or understanding ... to act together for the purpose of acquiring, holding, voting or disposing of shares of Common Stock.” The Exchange believes that Article FOURTH, as currently drafted, could result in an inappropriate chilling effect on legitimate discussions or other communications that do not implicate any of the Commission’s concerns underlying the concentration limits and the “Related Persons” definition, as discussed above.

The proposal provides that the following shall not create a presumption or inference that persons have an agreement, arrangement, or understanding for the purposes of determining “Related Persons,” as defined by Article FOURTH: (i) communications by or among any persons (or their officers, agents or representatives) for the purpose of understanding, considering, or communicating the advisability, desirability, or feasibility of any matter

concerning the interests of the Exchange or its shareholders, or (ii) the fact that two or more persons (or their officers, agents or representatives) may have expressed or communicated common views as to the advisability, desirability or feasibility of any matter concerning the interests of the Exchange or its shareholders (including, in either such case, by way of voting or otherwise acting as Governors,¹² members of standing or other committees or shareholders).

By listing non-exclusive examples of permitted discussions and other communications, the Exchange hopes to clarify that certain customary and appropriate conversations and other communications between and among shareholders will not cause the shareholders to be considered “Related Persons” and result in the aggregation of their shares or voting rights in a way that would improperly restrict legitimate communication among shareholders.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act¹³ in general, and furthers the objectives of Sections 6(b)(5) of the Act¹⁴ in particular, in that it is 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 by modifying Phlx’s Certificate to remove unnecessary burdens on the flexibility of the Exchange and its shareholders in effecting certain types of lawful fundamental transactions. The Exchange also believes that its proposal is consistent with Section 6(b)(1) of the Act¹⁵ in that it should facilitate appropriate deliberation, discussion, and activities by the shareholders of the Exchange in relation to fundamental transactions and other appropriate

¹² See Phlx By-Law Article I, Section 1-1(m).

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(5).

¹⁵ 15 U.S.C. 78f(b)(1).

matters, without compromising the policies underlying the concentration limits on voting and ownership of Common Stock of the Exchange contained in Article FOURTH of the Certificate.

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 that is 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. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change is concerned solely with the administration of the Exchange, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act and Rule 19b-4(f)(3) thereunder. At any time within 60 days of the filing of such proposed rule change the Commission may summarily abrogate 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.

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-2007-78 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2007-78. 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 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of 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-Phlx-2007-78 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁶

Nancy M. Morris
Secretary

¹⁶ 17 CFR 200.30-3(a)(12).