

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-53734; File No. SR-Phlx-2005-93)

April 27, 2006

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Approving a Proposed Rule Change and Amendment Nos. 1, 2, 3, 4, and 5 Thereto, and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 6 and 7, Relating to Amendments to its By-Laws and Charter in Connection with a Restructuring of its Board of Governors

I. Introduction

On December 30, 2005, the Philadelphia Stock Exchange, Inc. (“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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend its By-laws (“By-Laws”) and Restated Certificate of Incorporation (“Charter”) to revise the current structure of the Exchange’s Board of Governors (“Board”). On February 16, 2006, the Exchange filed Amendment No. 1 to the proposed rule change; on March 10, 2006, the Exchange filed Amendment No. 2 to the proposed rule change; on March 17, 2006, the Exchange filed Amendment No. 3 to the proposed rule change; and on March 20, 2006, the Exchange filed Amendment Nos. 4 and 5 to the proposed rule change.<sup>3</sup> The proposed rule change was published for comment in the Federal Register on March 23, 2006.<sup>4</sup>

The Commission received no comments on the proposal. On April 25, 2006, the Exchange filed Amendment No. 6 to the proposed rule change,<sup>5</sup> and on April 27, 2006, the

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> For a brief description of these amendments, see Securities Exchange Act Release No. 53518 (March 20, 2006), 71 FR 14766 (March 23, 2006) (“Notice”), at notes 3 through 7, inclusive.

<sup>4</sup> See Notice.

<sup>5</sup> In Amendment No. 6, the Exchange consolidated the rule text of the proposed rule change, as revised by prior amendments, into a single document; revised the proposed

Exchange filed Amendment No. 7 to the proposed rule change.<sup>6</sup> This order approves the proposed rule change, as amended by Amendment Nos. 1, 2, 3, 4, and 5. Simultaneously, the Commission provides notice of filing of Amendment Nos. 6 and 7, and grants accelerated approval of Amendment Nos. 6 and 7.

## II. Description of the Proposal

The proposed rule change, as amended, would revise both the Exchange's By-Laws and Charter to restructure the composition of the Board and certain Board committees. Specifically, the proposed rule change would create a majority independent Board; adopt definitions of "Independent" and "Independent Governor" and adopt independence determination standards based principally on the Commission's proposed SRO governance rulemaking;<sup>7</sup> convert all Non-Industry<sup>8</sup> Governor positions on the Board to Independent Governor positions and add an additional Independent Governor; eliminate the positions of On-Floor and Off-Floor Governors<sup>9</sup> and create Member Governor and Stockholder Governor positions;<sup>10</sup> revise the categories of

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definition of "Stockholder Governor" in the Charter and By-Laws to clarify its meaning; and made minor revisions and clarifying changes to the rule text and purpose section of the filing. Amendment No. 6 superseded and replaced the proposed rule change, as amended, in its entirety.

<sup>6</sup> In Amendment No. 7, the Exchange proposed to change the word "affiliation" to "relationship" in the proposed definition of "Material Relationship;" incorporated the portion of the statutory basis section of the filing that was inadvertently omitted in Amendment No. 6, and made other technical changes to the proposed rule text.

<sup>7</sup> See Securities Exchange Act Release No. 50669 (November 18, 2004), 69 FR 71126 (December 8, 2004) ("Proposed SRO Governance Rulemaking").

<sup>8</sup> See Phlx By-Laws Article I, Section 1-1(t) for a definition of "non-industry" when used in the context of Governors or committee members.

<sup>9</sup> See Phlx By-Laws Article IV, Section 4-1 for a discussion of On-Floor and Off-Floor Governors.

<sup>10</sup> See proposed Phlx By-Laws Article I, Sections 1-1(u) (defining "Member Governor") and 1-1(hh) (defining "Stockholder Governor").

Governors that are elected by Phlx members;<sup>11</sup> reduce the number of Vice-Chairmen of the Board from two to one and adopt new criteria for selecting the Vice-Chairman; and make other revisions, including with respect to the composition of various Board standing committees.

A. Board Composition

Currently, the Board consists of 22 Governors: the Chairman of the Board, who is the Chief Executive Officer of the Exchange; 11 Non-Industry Governors (including at least five Public Governors);<sup>12</sup> five On-Floor Governors; and five Off-Floor Governors. The Exchange has proposed to increase the number of Governors to 23 and to revise the composition of the Board to consist of: the Chairman of the Board, who is the Chief Executive Officer of the Exchange; 12 Independent Governors; six Stockholder Governors; two Member Governors; one Philadelphia Board of Trade (“PBOT”) Governor; and one Vice-Chairman.

1. Majority Independent Board

The Exchange proposes to convert all Non-Industry and Public Governor positions to Independent Governor positions and to add an additional Independent Governor, for a total of 12 Independent Governors. Under the proposal, an “Independent Governor” would be defined as a Governor who has no Material Relationship with the Exchange or any affiliate of the Exchange, any member of the Exchange or any affiliate of such member, or any issuer of securities that are listed or traded on the Exchange or a facility of the Exchange.<sup>13</sup> “Material Relationship” would

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<sup>11</sup> See infra note 17 and accompanying text.

<sup>12</sup> See Phlx By-Laws Article I, Section 1-1(y) for a definition of “public” when used in the context of Governors or committee members.

<sup>13</sup> See proposed Phlx By-Laws Article I, Sections 1-1(o) and (p). See also proposed Phlx Charter Article FOURTH (b)(iii)(A).

be defined as a relationship, compensatory or otherwise, that could reasonably affect the independent judgment or decision-making of a Governor.<sup>14</sup> The proposed rule change would require the Nominating, Elections and Governance Committee first to ascertain that candidates for Independent Governor positions are qualified under the proposed definition of “Independent” prior to nominating them,<sup>15</sup> and then would require the Board to make subsequent independence determinations following an Independent Governor’s nomination at least annually, and as often as necessary in light of a Governor’s circumstances.<sup>16</sup>

## 2. Designated Governors

The Exchange proposes to replace the five On-Floor Governor positions with five Designated Governor positions. The “Designated Governors” would consist of the two Member Governors, the two Designated Independent Governors, and the one PBOT Governor.<sup>17</sup> A “Member Governor” is defined as a Governor who is a member or a general partner or an executive officer (vice-president and above) of a member organization and is duly elected to fill one of the two (2) vacancies on the Board of Governors allocated to Member Governors.<sup>18</sup> The “Designated Independent Governors” are the two Independent Governors who are elected by the

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<sup>14</sup> See proposed Phlx By-Laws Article I, Section 1-1(s).

<sup>15</sup> See proposed changes to Phlx By-Laws Article III, Section 3-4(a) and Article XXVIII, Section 28-3(c).

<sup>16</sup> See proposed “Annual Independence Review” in the Phlx By-Laws Article IV, Section 4-4(b).

<sup>17</sup> At the annual meeting of members and member organizations, member organization representatives elect the Designated Governors, who are then elected at the annual stockholders meeting by the holder of the Series A Preferred Stock. See Phlx By-Laws, Article III, Section 3-2(a) and Article XXVIII, Section 28-2.

<sup>18</sup> See proposed Phlx By-Laws Article I, Section 1-1(u).

Phlx members.<sup>19</sup> The “PBOT Governor” is a Governor who is a member of the PBOT and is duly elected to fill the one (1) vacancy on the Board allocated to the PBOT Governor.

### 3. Stockholder Governors

The Exchange also proposes to replace the five Off-Floor Governor positions with six Stockholder Governor positions. The Stockholder Governors would be elected by the holders of the Exchange’s Common Stock. A “Stockholder Governor” is defined as a Governor who is a holder of Class A or Class B Common Stock in the Exchange or an officer, director (or a person in a similar position in business entities that are not corporations), designee or an employee of a holder of Class A or Class B Common Stock in the Exchange or of any affiliate or subsidiary of such holder of Class A or Class B Common Stock and who is duly elected to fill one of the six vacancies on the Board of Governors allocated to the Stockholder Governors.<sup>20</sup> In addition to electing the Stockholder Governors, the Exchange’s Common Stock holders would elect 10 of the 12 Independent Governors.

### 4. Single Vice-Chairman of the Board

Currently, there are two Vice-Chairmen of the Board; one Vice-Chairman is selected from one of the On-Floor Governors by the member organization representatives or, if there is no contest between or among Floor Governors, by the Board, and one Vice-Chairman is selected from one of the Off-Floor Governors by the Board.<sup>21</sup> The Phlx proposes to amend its By-Laws

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<sup>19</sup> The former 11 Non-Industry Governors were elected by the holders of the Exchange’s Common Stock. Under the proposed rule change, two of the 12 Independent Governors would be Designated Independent Governors and would be elected by Phlx members and member organizations, through their respective member organization representatives, but the other 10 Independent Governors would be elected by the holders of the Exchange’s Common Stock. See discussion infra Sections II.A.3 and III.

<sup>20</sup> See Amendment No. 6 (proposing to amend proposed Phlx By-Laws Article I, Section 1-1(hh)). See also proposed Phlx Charter Article FOURTH (b)(iii)(A)).

<sup>21</sup> See Phlx By-Laws Article IV, Section 4-2.

to provide for a single Vice-Chairman of the Board, who would be recommended by the Chairman for nomination by the Nominating, Elections and Governance Committee and elected by the holders of Common Stock.<sup>22</sup> The Vice-Chairman would serve as a Governor and would not be subject to any term limits.<sup>23</sup> The Vice-Chairman would be required to be an individual who, within the prior three years, has been a member primarily engaged in business on the Exchange's equity market or equity options market, or is a general partner, executive officer (vice-president or above) or a member associated with a member organization primarily engaged in business on the Exchange's equity market or equity options market.<sup>24</sup>

#### B. Composition of Board Committees

The Exchange proposes to revise the composition of certain Board committees to reflect the proposed Board restructuring.

##### 1. Nominating, Elections and Governance Committee

Currently, the Phlx's Nominating and Elections Committee is composed of seven members: the committee Chairman, who must be a Public Governor; three Non-Industry Governors; one Off-Floor Member, who may be a Governor; one On-Floor Equity Governor; and one On-Floor Equity Options Governor.<sup>25</sup> The Exchange proposes to reduce the size of this committee to five members, consisting of: three Independent Governors (one of whom must be a Designated Independent Governor), one Member Governor, and one Stockholder Governor. The Exchange also proposes to rename the committee as the "Nominating, Elections and Governance

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<sup>22</sup> See proposed Phlx By-Laws Article XXVIII, Section 28-3(b) and proposed Phlx Charter Article FOURTH (b)(iii)(A).

<sup>23</sup> See proposed Phlx By-Laws Article IV, Section 4-3(a).

<sup>24</sup> See proposed Phlx By-Laws Article V, Section 5-2.

<sup>25</sup> See Phlx By-Laws Article X, Section 10-19(a).

Committee.” The Nominating, Elections and Governance Committee would select its Chairman from among the members of the committee that are Independent Governors.

2. Business Conduct Committee

The Exchange’s Business Conduct Committee currently is composed of nine members: three Non-Industry Governors (one of whom must be a Public Governor); one Equity Floor member; one Equity Options Floor member; one At-Large Floor member; and three Off-Floor members. The Exchange proposes to modify this committee’s composition to be as follows: three Independent Governors; four persons who are either Phlx members or associated with a member organization; one Phlx member whose business principally is carried out on the equity floor; and one Phlx member whose business is principally carried out on the equity options floor.

3. Compensation Committee

The Phlx’s Compensation Committee is composed of five members: three Non-Industry Governors (one of whom must be a Public Governor) and the two Vice-Chairmen of the Board. The Chairman of the committee must be one of the Non-Industry Governors. The proposal would modify the composition of this committee to be as follows: four Independent Governors, one of whom must serve as Chairman of the committee, and the Vice-Chairman of the Board.

4. Executive Committee

The Exchange’s Executive Committee is composed of nine members: the Chairman of the Board who serves as the committee’s chairman; the two Vice-Chairmen of the Board; the Chairman of the Finance Committee; the Chairmen of the two floor committees whose floors are not represented by the On-Floor Vice-Chairman; one Off-Floor Governor; and two Non-Industry Governors, one of whom must be a Public Governor. The proposal would modify the committee’s composition to be as follows: the Chairman of the Board; the Vice-Chairman of the

Board; two Stockholder Governors; two Independent Governors; the Chairman of the Finance Committee; and two Chairmen of floor committees.

5. Quality of Markets Committee

The Exchange proposes to modify the composition of the Quality of Markets Committee. Specifically, the Exchange proposes to convert all Non-Industry committee member positions to Independent committee member positions and all Industry committee member positions to Stockholder and Member committee member positions. The Quality of Markets Committee would be required to include as many Independent committee members as it does Stockholder and Member committee members.

C. Other Changes

The Exchange also proposes to make other changes to its Charter and By-Laws. The Exchange proposes to remove the requirement in Article NINTH of its Charter that any action required or permitted to be taken at any meeting of the Exchange's stockholders may be taken without a meeting, without prior notice and without a vote, only with the unanimous written consent of all the stockholders entitled to vote thereon. The default provision in the Delaware General Corporate Law statute would apply instead.<sup>26</sup> The Exchange also made minor and/or clarifying changes to its By-Laws.<sup>27</sup>

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<sup>26</sup> Under title 8, section 228(a) of the Delaware Code, unless otherwise provided in a company's certificate of incorporation, any action that may be taken at a stockholders meeting may be taken without a meeting, without prior notice, and without a vote, upon the written consent of at least the minimum number of votes that would be necessary to take such action at a meeting if all the shares entitled to vote thereon were present and voted.

<sup>27</sup> These minor changes include capitalizing certain defined terms ("Stockholder," "Member," "Member Organization") and providing a more specific a citation to its arbitration rules.



#### D. Transition Period

The Exchange represents that the proposed amendments to its Charter and By-Laws would require minimal changes to the existing composition of the Board, subject to a formal analysis and determination by the Board of the qualifications of the Independent Governors, and would largely result in a reclassification of current Board positions. The Exchange further represents that, upon approval of the proposed rule change, it intends to hold the annual meeting of its members and member organizations, followed by the annual meeting of its stockholders, in order to elect the class of 2009 Governors. The class of 2009 Governors would be nominated and elected pursuant to the new requirements of the amended Charter and By-Laws. The Exchange would permit the current classes of 2007 and 2008 Governors to complete their terms, but would have the Nominating, Elections and Governance Committee, with the Board's approval, appoint such Governors to fill the new positions established by the amended Charter and By-Laws until the expiration of their terms in 2007 and 2008, respectively.

#### III. Discussion and Commission Findings

After careful consideration, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>28</sup> In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(3) of the Act, which provides that the rules of an exchange must assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors

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<sup>28</sup> In approving this proposed 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).

shall be representative of issues and investors and not be associated with a member of the exchange, broker, or dealer.<sup>29</sup>

The Phlx's Board of Governors currently is composed of the Chairman of the Board (who must be the Exchange's Chief Executive Officer) and 21 other Governors. By adding a new Governor position, which would be classified as an Independent Governor position, the Exchange would create a Board that is composed of a majority of Independent Governors, *i.e.*, 12 of the 23 Governors on the Board would have to satisfy the proposed independence standards. The Nominating, Elections and Governance Committee would be required to evaluate whether potential candidates for the Independent Governor positions satisfy the Exchange's independence criteria prior to nominating such candidates for election. Moreover, upon an Independent Governor's election, the Board would be required to reassess such Governor's independence at least annually and as often as necessary in light of such Governor's circumstances. The Commission believes that the majority independent Board should help the Exchange mitigate any conflicts of interest that may arise when persons with a nexus to the Exchange are involved in key decisions.<sup>30</sup> Furthermore, the proposal to conduct periodic independence determinations should help ensure that the Exchange's independence standards are maintained during an Independent Governor's tenure on the Board.

Currently, the five Governors elected by Phlx members, through their member organization representatives, consist of the four On-Floor Governors and one Industry Governor

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<sup>29</sup> 15 U.S.C. 78f(b)(3).

<sup>30</sup> The Commission notes that the Phlx's proposals to create a majority independent Board, to impose independence criteria for the majority of its Governors and to assess periodically the independence determinations for those Governors are consonant with similar provisions in the Proposed SRO Governance Rulemaking. The Commission notes, however, that the Exchange may be required to make additional changes to further strengthen its governance structure, depending upon the results of this rulemaking.

who is a member of PBOT. The Exchange proposes to revise the categories of Governors who are elected by members to consist of two Member Governors, one PBOT Governor, and two Designated Independent Governors (collectively, the Designated Governors). Although the proposal would reduce from four to two the number of Governors who are Phlx members and are elected by the Exchange's membership, it would add two Designated Independent Governors to be elected by Phlx members. Accordingly, it would not reduce the number of Governors elected by Phlx members. Moreover, the proposal would not alter the right of Phlx members to submit independent nominations for the Designated Governor positions.

In addition, the Exchange proposes to revise the composition of its Nominating, Elections and Governance Committee. This committee currently is composed of seven members, two of whom are On-Floor Governors and thus are elected by Phlx members. Under the Exchange's proposal, the committee would consist of five members, two of whom must be a Designated Independent Governor and a Member Governor. The Exchange also proposes revisions to the composition of its Business Conduct Committee by requiring three of its nine members to be Independent Governors, four committee members to be Phlx members or persons associated with a member organization, one committee member to be a Phlx member who primarily conducts business on the Phlx's equity floor, and one committee member to be a Phlx member who primarily conducts business on the equity options floor.

In the Commission's view, the revisions to the composition of the Board, the Nominating, Elections and Governance Committee, and the Business Conduct Committee provide for the fair representation of members in the selection of the Exchange's directors and the administration of its affairs, consistent with the requirements of Section 6(b)(3) of the Act.<sup>31</sup>

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<sup>31</sup> 15 U.S.C. 78f(b)(3).

The Commission finds good cause to approve Amendment Nos. 6 and 7 to the proposed rule change prior to the 30th day after the amendment is published for comment in the Federal Register. In Amendment No. 6, the Exchange proposes to incorporate the proposed definitions of “Member Organization,” “Vice-Chairman,” “Material Relationship,” and “Stockholder” as contained in the Phlx By-Laws into Article FOURTH of its Charter because these terms are used throughout the Phlx Charter. In Amendment No. 6, the Exchange also proposes to revise the definition of “Stockholder Governor” to clarify the categories of persons eligible to serve as a Stockholder Governor. In Amendment No. 7, the Exchange proposes to change the word “affiliation” in the proposed definition of “Material Relationship” to “relationship” and to incorporate the portion of text in the statutory basis section of the proposed rule change that was inadvertently omitted in Amendment No. 6. In both Amendment Nos. 6 and 7, the Exchange proposes other minor revisions that are technical in nature and do not affect the substance of the proposed rule change.

The Commission believes that the proposed revisions made by Amendment Nos. 6 and 7 clarify the proposed rule change, as amended, and do not change its substance. Accordingly, the Commission finds good cause to accelerate approval of Amendment Nos. 6 and 7.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment Nos. 6 and 7 are 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](mailto:rule-comments@sec.gov). Please include File No. SR-Phlx-2005-93 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-2005-93. 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 Commissions 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. Copies of such filing also will be available for inspection and copying at the principal office of the 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 available publicly. All submissions should refer to File Number SR-Phlx-2005-93 and should be submitted by [insert date 21 days from the date of publication in the Federal Register].

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>32</sup> that the proposed rule change (SR-Phlx-2005-93), as amended by Amendment Nos. 1, 2, 3, 4,

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<sup>32</sup> 15 U.S.C. 78s(b)(2).

and 5, be, and hereby is, approved and that Amendment Nos. 6 and 7 to the proposed rule change be, and hereby are, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>33</sup>

Nancy M. Morris  
Secretary

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<sup>33</sup> 17 CFR 200.30-3(a)(12).