

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-53518; File No. SR-Phlx-2005-93)

March 20, 2006

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change and Amendments Nos. 1, 2, 3, 4 and 5 Thereto to Amend its By-Laws and Charter in Connection with a Restructuring of its Board of Governors

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> notice is hereby given that on December 30, 2005, 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 and II below, which items have been prepared by the Phlx. On February 16, 2006, the Exchange filed Amendment No. 1 to the proposed rule change;<sup>3</sup> on March 10, 2006, the Exchange filed Amendment No. 2 to the proposed rule change;<sup>4</sup> on March 17, 2006, the Exchange filed Amendment No. 3 to 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> In Amendment No. 1, the Phlx revised the proposed definitions of the terms “Independent” and “Material Relationship” that are to be included in the Exchange’s By-Laws and made clarifying changes to the purpose section and to the rule text of the proposed rule change.

<sup>4</sup> In Amendment No. 2, the Phlx incorporated the proposed definition of “Independent Governor” in the Exchange’s Restated Certificate of Incorporation (“Charter”); incorporated the definition of “Annual Independence Review” in the Exchange’s By-Laws; revised the rule text to clarify the standards to be applied by the Nominating, Elections and Governance Committee in evaluating nominees for Independent Governor; described in the purpose section of the proposed rule change the selection criteria for the position of Vice-Chairman; and made clarifying changes to the rule text.

proposed rule change;<sup>5</sup> and on March 20, 2006, the Exchange filed Amendment Nos. 4<sup>6</sup> and 5<sup>7</sup> to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, 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 By-Laws and Charter to revise the current structure of the Phlx Board of Governors ("Board"). Specifically, the Exchange proposes to: (i) voluntarily conform to certain aspects of the Commission's proposed SRO Governance Rulemaking, including the incorporation of the concept of "independent directors;"<sup>8</sup> (ii) create a single Vice-Chairman of the Board; (iii) eliminate the distinction between On-Floor and Off-Floor Governors; (iv) make changes to the election of Governors in the By-Laws and Charter; and (v) make other modifications, including revising the composition of various Phlx standing committees. The text of the proposed rule change, as amended, is available at the Commission's Public Reference Room, at the Exchange's Web site (<http://www.phlx.com>) and at the Exchange's principal office.

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<sup>5</sup> In Amendment No. 3, the Phlx revised the purpose section and the rule text of the proposed rule change to set forth that the Nominating, Elections and Governance Committee shall be composed of five persons as follows: three Independent Governors (one of whom must be a Designated Independent Governor), one Stockholder Governor, and one Member Governor.

<sup>6</sup> In Amendment No. 4, the Phlx deleted revisions, as proposed in the original filing, that would have capitalized the term "member" in various Charter provisions and reinstated in the Charter a reference to "member (as such term is defined in the Exchange Act)."

<sup>7</sup> In Amendment No. 5, the Phlx revised the statutory basis section of the proposed rule change.

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

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 Phlx included statements concerning the purpose of, and basis for, the proposed rule change, as amended, 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 purpose of the proposed rule change is to address various governance issues in both the Exchange’s By-Laws and Charter.

Conformance to Certain Aspects of the Proposed SRO Governance Rulemaking

One purpose of the proposed rule change is to amend the Exchange’s By-Laws and Charter to voluntarily conform to certain aspects of the Proposed SRO Governance Rulemaking, including the concept of “independent directors” as set forth in the proposed rulemaking.<sup>9</sup> The Exchange proposes to convert all non-industry<sup>10</sup> positions to independent positions and to add an

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<sup>9</sup> See id.

<sup>10</sup> Currently, “non-industry” is defined as follows: The term non-industry when used in the context of Governors or committee members shall mean (a) public Governors; (b) officers and employees of issuers of securities listed on the Exchange; (c) persons affiliated with brokers and dealers that operate solely to assist the securities-related activities of the business of non-member affiliates (such as brokers or dealers established to (i) distribute an affiliate’s securities which are issued on a continuous or regular basis, or (ii) process the limited buy and sell orders of the shares of employee owners of the affiliate); (d) employees of an entity that is affiliated with a broker or dealer that does not account for a material portion of the revenues of the consolidated entity, and who are primarily engaged in the business of the non-member entity; and (e) other individuals who would not be industry Governors or committee members. Phlx By-Laws Article I, Section 1-1(t).

additional Independent Governor to ensure a majority of Independent Governors in accordance with the Proposed SRO Governance Rulemaking.<sup>11</sup> 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. A material relationship would be defined as a relationship, compensatory or otherwise, that reasonably could affect the independent judgment or decision-making of a Governor. The Board would make this independence determination upon a Governor's nomination and no less frequently than annually and as often as necessary in light of a Governor's circumstances and pursuant to Article IV, Section 4-4 of the Phlx By-Laws to ensure that the status of all incumbent Independent Governors do not fall outside the definition of Independent.<sup>12</sup> The designation of "Independent" would replace the defined terms "public"<sup>13</sup> and "non-industry," as presently set forth in the Phlx's By-Laws and Charter. Currently, the Board consists of 22 Governors.<sup>14</sup> Under this proposal, the Board would consist of 23 Governors. Accordingly, the Board would consist of a majority of Independent Governors.

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<sup>11</sup> See supra at note 8.

<sup>12</sup> "Independent" would be defined in the Phlx By-Laws, Article 1, Section 1-1(o) as follows: The term "Independent," when used in the context of Governor or Committee Members, shall mean persons affirmatively determined by the Board as having 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> "Public" is defined in the Phlx By-Laws Article I, Section 1-1(y) as follows: The term "public" when used in the context of Governors or committee members shall mean non-industry persons who have no material business relationship with a broker, dealer or the Exchange." The proposed rule change would delete the definition of "public" from the Phlx By-Laws.

<sup>14</sup> See Phlx Charter Article Seventh, and Phlx By-Laws Article IV, Section 4-1.

### Single Vice-Chairman

The Phlx proposes to amend its By-Laws and Charter to create, in proposed Phlx By-Laws Article V, Section 5-2, 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 stockholders. The Vice-Chairman would not be subject to a term limit. The Vice-Chairman would be an individual who, anytime 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. Currently, the By-Laws require two Vice-Chairmen of the Board, with one Vice-Chairman elected as an On-Floor Governor by the Members, and the other Vice-Chairman elected as an Off-Floor Governor by the stockholders. The Exchange proposes this change to conform to a structure that is more typical of a for-profit stock corporation and also because the two Vice-Chairmen model is not sustainable if the "On-Floor" and "Off-Floor" distinctions are eliminated, as discussed below.

### Elimination of the “On-Floor” and “Off-Floor” Governor Distinction

The Exchange proposes to eliminate the distinction between “On-Floor”<sup>15</sup> and “Off-Floor”<sup>16</sup> Governors, in both its By-Laws and Charter, to allow for greater stockholder representation and, specifically, representation on the Board of the six recently acquired strategic investors.<sup>17</sup> Presently, there are five Off-Floor Industry Governors elected by the stockholders and five On-Floor Industry Governors elected by the Members. The Exchange proposes to replace this current model with nine positions that would consist of six positions elected by stockholders, two Member positions and one Philadelphia Board of Trade (“PBOT”) position. The Member positions and the PBOT position would be elected by Members of the Exchange.

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<sup>15</sup> Phlx By-Laws Article IV, Section 4-1 provides that an “On-Floor Governor” is “an industry Governor and is a member primarily engaged in business on the Exchange’s Equity Floor or a general partner, executive officer (vice president and above) or member associated with a member organization primarily engaged in business on the Exchange’s Equity Floor (On-Floor Equity Governor)...[and] is an industry Governor and is a member of the Philadelphia Board of Trade (On-Floor PBOT Governor)...[and] is an industry Governor and is a member primarily engaged in business as a specialist on the Exchange’s Equity Options Floor or a general partner, executive officer (vice president and above) or a member associated with a member organization primarily engaged in specialist business on the Exchange’s Equity Options Floor (On-Floor Equity Options Specialist Governor)...[and] is an industry Governor and is a member primarily engaged in business as a registered options trader on the Exchange’s Equity Options Floor or a general partner, executive officer (vice president and above) or a member associated with a member organization primarily engaged in registered options trader business on the Exchange’s Equity Options Floor (On-Floor Equity Options Registered Options Trader Governor); and ... who is an industry Governor and is a member primarily engaged in business on the Exchange’s Equity Options Floor as a floor broker (On-Floor Equity Options Broker Governor).”

<sup>16</sup> Phlx By-Laws Article IV, Section 4-1 provides that “Off-Floor Governors” are “industry Governors and general partners, executive officers (vice president or above), or members or participants associated with member or participant organizations which conduct a non-member or non participant public customer business and shall individually not be primarily engaged in business activities on the Exchange Floor.”

<sup>17</sup> During 2005, six firms invested in the Exchange: Citigroup Financial Products, Inc.; Credit Suisse First Boston NEXT Fund, Inc.; Morgan Stanley & Co., Inc., UBS Securities LLC; Citadel Derivatives Group, LLC; and Merrill Lynch, Pierce Fenner & Smith, Inc.

## Election of Governors

The Exchange proposes to amend its By-Laws and Charter to reflect that two of the Independent Governors will be nominated and elected by the Members of the Exchange, as will both Member Governors and the PBOT Governor, in order to maintain the 20% fair representation of membership on the Board.<sup>18</sup> The Exchange represents that the proposed amendments to its Charter and By-Laws, in and of themselves, would require minimal changes to the present composition of the Board, subject to a formal analysis and determination by the Board of the qualifications of the Independent Governors, and would be largely a reclassification of Board positions.

The Exchange would conform the composition of the Board to the provisions of the proposed rule change as follows: upon the approval of the proposed rule change by the Commission, the Exchange will hold an Annual Meeting of Member and Member Organizations, to be followed by the Annual Meeting of Stockholders to elect the class of Governors for 2006. The class of 2006 Governors will be nominated and elected pursuant to the Charter and By-Laws, as proposed to be amended, with two of the nine Board positions being nominated and selected by the Members and elected by the Trustee of the Series Class A Preferred Stock. The classes of 2007 and 2008 Governors will be permitted to complete their terms but will be appointed by the Nominating, Elections and Governance Committee, with the approval of the Board, to fill the new positions established by the amendments until which time those positions come up for election in either 2007 and 2008 respectively.<sup>19</sup> Following the election of the class

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<sup>18</sup> See Section 6(b)(3) of the Act, 15 U.S.C. 78f(b)(3). See also Proposed SRO Governance Rulemaking. The Exchange states that it is proposing to voluntarily adopt certain concepts addressed in the Commission's Proposed SRO Governance Rulemaking.

<sup>19</sup> See Phlx By-Laws Article IV, Section 4-7.

of 2006, over 20% of the Governors serving on the Board will have been nominated and elected by the Members.

### Stockholder Meetings

With regard to its Charter, the Phlx seeks to remove Article Ninth to allow greater flexibility in the Exchange's governance processes. In the absence of this Article, the issue of obtaining the written consent of the stockholders of the Exchange for any action in lieu of a meeting will be governed by Delaware General Corporation Law, which will allow stockholders to take actions outside of a stockholder meeting by less-than-unanimous written consent.

### Other Modifications

To conform with the proposed changes to the Board's composition described above, the Exchange also proposes to amend its By-Laws and Charter sections relating to Board Committees as follows:<sup>20</sup>

- The following committees are not affected by the changes described herein with the exception of minor technical modifications:
  - o Admissions
  - o Options Allocation, Evaluation and Securities Committee
  - o Equity Allocation Evaluation and Securities Committee
  - o Floor Procedure
  - o Foreign Currency Options
  - o Marketing

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<sup>20</sup> The Exchange notes that no changes are being made to Phlx By-Laws Article X, Section 10-9, its Audit Committee provision. The Commission recently approved a proposed rule change to amend this provision of the Phlx By-Laws to require, among other things, that the members of the Audit Committee be "Independent Governors." See Securities

- o Options
- The Automation Committee currently allows for the Chairman of the Committee to be designated as a Non-Industry or Off-Floor Governor. The proposal would change this designation to a Stockholder or Independent Governor.
- The Business Conduct Committee is currently composed of three Non-Industry Governors (one of whom must be Public); one Equity Floor Member; one Equity Options Floor Member; one At-Large Floor Member; and three Off-Floor Members. The proposal would modify the composition as follows: three Independent Governors; four Members or persons associated with a Member Organization; one Member who primarily conducts business on the Equity Floor; and one Member who primarily conducts business on the Equity Options Floor.
- The Compensation Committee is currently composed of one Chairman (who must be a Non-Industry Governor); two Non-Industry Governors (one of whom must be a Public Governor); and the two Vice-Chairmen of the Board. The proposal would modify the composition as follows: four Independent Governors (one of whom must serve as chairman of the committee) and the Vice-Chairman of the Board.
- The Executive Committee is currently composed of the Chairman of the Board; the two Vice-Chairmen of the Board; the Chairman of the Finance Committee; one Chairman of a floor committee not represented by the On-Floor Vice-Chairman; one Chairman of a floor committee not represented by the Off-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 composition 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.

- The Finance Committee is currently composed as follows: the Chairman of the Board; the two Vice-Chairmen of the Board; one On-Floor Member (who may be a Governor); one Off-Floor Member (who may be a Governor); and four Non-Industry Governors (one whom must be a Public Governor). The proposal would modify the composition as follows: the Chairman and Vice-Chairman of the Board; two Members or persons associated with a Member Organization, who may be Governors (one of whom conducts business primarily on the Equity or Equity Options Floor); one Stockholder Governor; and four Independent Governors. The Chairman of this committee would be the Vice-Chairman of the Board, a Stockholder Governor or a Member Governor.
- The Nominating and Elections Committee would be renamed the Nominating, Elections and Governance Committee. The purpose of this change is to have the Committee's name more properly reflect the existing role and function of this Committee. No substantive changes in the Committee's functions are proposed. The Nominating and Elections Committee is currently composed of the following: the Chairman (who must be a Non-Industry 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. The proposal

would modify the composition as follows: three Independent Governors (one of whom must be a Designated Independent Governor); one Stockholder Governor; and one Member Governor. The Nominating , Elections and Governance Committee would select its Chairman from among the members of such Committee who are Independent Governors. Constituted in this manner, the interests of the Members of the Exchange, by virtue of the Member Governor and the Designated Independent Governor who are both elected by the Members, would be represented by at least 20% of the Committee in compliance the fair representation requirement of Section 6(b)(3) of the Act.<sup>21</sup>

- The Quality of Markets Committee would not change in any way, except that “Non-Industry Governors” would be called “Independent Governors” and “Industry Governors” would be called “Stockholder Governors.”

In addition, various technical modifications have been made to the Phlx By-Laws for purposes of consistency.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>22</sup> in general, and furthers the objectives of Section 6(b)(3) of the Act<sup>23</sup> in particular, in that it is designed to assure a fair representation of its members in the selection of its directors and administration of its affairs because the members will elect five Designated Governors, including two Designated Independent Governors, one PBOT Governor, and 2 Member Governors. The

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<sup>21</sup> 15 U.S.C. 78f(b)(3).

<sup>22</sup> 15 U.S.C. 78f(b).

<sup>23</sup> 15 U.S.C. 78f(b)(3).

Exchange also believes that its proposal furthers the objectives of Section 6(b)(3) of the Act<sup>24</sup> because the Nominating, Elections and Governance Committee will consist of three Independent Governors (one of whom must be a Designated Independent Governor), one Stockholder Governor, and one Member Governor, with the Designated Independent Governor elected by the Members, ensuring greater Member representation.

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

The Exchange does not believe that the proposed rule change would 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 by the Exchange.

III. Date of Effectiveness of the Proposed Rule

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve such proposed rule change; or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

The Phlx has requested accelerated approval of the proposed rule change. While the Commission will not grant accelerated approval at this time, the Commission will consider granting accelerated approval of the proposal at the close of the comment period, 21 days from the date of publication of the proposal in the Federal Register.

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<sup>24</sup> 15 U.S.C. 78f(b)(3).

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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](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 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. 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].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>25</sup>

Jill M. Peterson  
Assistant Secretary

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<sup>25</sup> 17 CFR 200.30-3(a)(12).