Proposed Rule Change by Philadelphia Stock Exchange

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial Amendment Withdrawal  Section 19(b)(2) Section 19(b)(3)(A) Section 19(b)(3)(B)

Rule

Pilot Extension of Time Period for Commission Action Date Expires

☑ 19b-4(f)(1) ☐ 19b-4(f)(4)
☐ 19b-4(f)(2) ☐ 19b-4(f)(5)
☑ 19b-4(f)(3) ☐ 19b-4(f)(6)

Description

Provide a brief description of the proposed rule change (limit 250 characters).

Proposed rule change relating to the Exchange's Revised Certificate of Incorporation.

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name Angela Last Name Dunn
Title Director and Counsel
E-mail angela.dunn@phlx.com
Telephone (215) 496-5692 Fax (215) 486-6729

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date 10/05/2007  By Richard S. Rudolph  Vice President and Counsel

(Note)

(Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.
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<th>Section</th>
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<tr>
<td><strong>Form 19b-4 Information</strong></td>
<td>The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.</td>
</tr>
<tr>
<td><strong>Exhibit 1 - Notice of Proposed Rule Change</strong></td>
<td>The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3).</td>
</tr>
<tr>
<td><strong>Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications</strong></td>
<td>Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.</td>
</tr>
<tr>
<td><strong>Exhibit 3 - Form, Report, or Questionnaire</strong></td>
<td>Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.</td>
</tr>
<tr>
<td><strong>Exhibit 4 - Marked Copies</strong></td>
<td>The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.</td>
</tr>
<tr>
<td><strong>Exhibit 5 - Proposed Rule Text</strong></td>
<td>The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.</td>
</tr>
<tr>
<td><strong>Partial Amendment</strong></td>
<td>If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission’s permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.</td>
</tr>
</tbody>
</table>

For complete Form 19b-4 instructions please refer to the EFFS website.
1. **Text of the Proposed Rule Change**

The Philadelphia Stock Exchange, Inc. (“Phlx” or “Exchange”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")\(^1\) and Rule 19b-4 thereunder,\(^2\) proposes to amend the Phlx’s Restated Certificate of Incorporation ("Certificate") by modifying the definition of “Related Persons” in Article FOURTH.

A notice of the proposed rule change for publication in the Federal Register is attached hereto as Exhibit 1. The text of the proposed rule change is set forth below.

*New language is underlined.*

**RESTATED CERTIFICATE OF INCORPORATION OF PHILADELPHIA STOCK EXCHANGE, INC.**

FIRST-THIRD  No Change.

FOURTH:

(a)  No Change.

(b)  (i) - (iii) (A)  No Change.

(B) In the event that any Person, either alone or together with its Related Persons (as hereinafter defined), at any time owns of record or beneficially, whether directly or indirectly, more than 20% of the then outstanding shares of Common Stock (such shares of Common Stock in excess of such 20% limit being hereinafter referred to as "Excess Shares"), such Person and its Related Persons shall have no right to vote, or to give any consent or proxy with respect to, such Excess

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Shares, and such Excess Shares shall be deemed not to be present for the purposes of determining whether a quorum is present at any meeting or vote of the stockholders of the Corporation or entitled to vote in determining the number of shares required to be voted for approval of or to give consent with respect to any matter presented to the stockholders of the Corporation. For the purposes of this Certificate, “Related Persons” shall mean (1) with respect to any Person, 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, other than any such agreement, arrangement or understanding pertaining to any of the following (each, an “Exempted Matter”): a merger, sale, acquisition or other corporate affiliation of or by the Corporation or any subsidiary; the sale of all or substantially all of the assets of the Corporation; the issuance, offer or sale by the Corporation and/or one or more shareholders (whether in one or more public or private transactions) of Common Stock of the Corporation; the preparation, filing with the SEC (as hereinafter defined) or dissemination of a registration, proxy or information statement in respect of any of the foregoing; any proposal or plan to do any of the foregoing; or any step that is required for, or specifically and directly related to, any of the foregoing. As to any matter that is not an Exempted Matter, in determining whether two or more persons are “Related Persons” under clause (3) of the definition thereof, neither (1) 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 Corporation or its shareholders nor (2) 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 Corporation or its shareholders nor (2) 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 Corporation or its shareholders (including, in either such case, by way of voting or otherwise acting as Governors, members of standing or other committees or shareholders) shall create any presumption or inference that such persons have an agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of shares of Common Stock.

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FIFTH-SIXTEENTH No Change
2. **Procedures of the Self-Regulatory Organization**

   The Exchange’s Board of Governors approved the proposed rule change for filing with the Securities and Exchange Commission (“SEC” or “Commission”) on September 11, 2007. The shareholders of the Exchange approved the amendment at a special meeting of shareholders held on October 5, 2007.

   Questions and comments on the proposed rule change may be directed to Angela Saccomandi Dunn, Director and Counsel, at (215) 496-6792 or Scott Donnini, First Vice President and Associate General Counsel, at (215) 496-5358.

3. **Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

   a. **Purpose**

   As discussed further below, the purpose of this proposal 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. 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. For purposes of applying these limitations, the holdings of a 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, 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.

The 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 6\(^5\) and 19\(^6\) of the Act. The Exchange believes that the “Related Persons” definition is intended

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3 The concentration limits in the Certificate limit any person, either alone or together with its Related Person, from (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 SEC approval, is permitted in certain cases. See Article FOURTH (b)(iii) and (v).

4 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.


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. 8

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

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

i. 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 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.9

9 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.
ii. **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 SEC, 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.

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.

iii. **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 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, 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

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10 See Phlx By-Law Article I, Section 1-1(m).
result in the aggregation of their shares or voting rights in a way that would improperly restrict legitimate communication among shareholders.

b. **Statutory Basis**

The Exchange believes that its proposal is consistent with Section 6(b) of the Act\textsuperscript{11} in general, and furthers the objectives of Sections 6(b)(5) of the Act\textsuperscript{12} 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 proposal is consistent with Section 6(b)(1) of the Act\textsuperscript{13} in that it 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.

4. **Self-Regulatory Organization’s Statement on Burden on Competition**

The Phlx 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.

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\textsuperscript{11} 15 U.S.C. 78f(b).

\textsuperscript{12} 15 U.S.C. 78f(b)(5).

\textsuperscript{13} 15 U.S.C. 78f(b)(1).
5. **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.

6. **Extension of Time Period for Commission Action**

The Exchange does not consent to an extension of the time period for Commission action.

7. **Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)**

The foregoing proposed rule change is concerned solely with the administration of the Exchange pursuant to Section 19(b)(3)(A) (iii) of the Act\(^1\) and Rule 19b-4(f)(3)\(^2\) thereunder. Accordingly, the proposal will take effect upon filing with the Commission. At any time within 60 days of the filing of the 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.

8. **Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission**

The proposed rule change is not based on the rules of another self-regulatory organization or of the Commission.

9. **Exhibits**

1. Notice of proposed rule for publication in the *Federal Register*.

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Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")\(^1\), and Rule 19b-4\(^2\) thereunder, notice is hereby given that on ______________________ 2007, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Phlx. 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 Phlx, pursuant to Section 19(b)(1) of the Act\(^3\) and Rule 19b-4 thereunder,\(^4\) proposes to amend the Phlx’s Restated Certificate of Incorporation ("Certificate") by modifying the definition of “Related Persons” in Article FOURTH.

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The text of the proposed rule change is set forth below.

New language is underlined.

RESTATED CERTIFICATE OF INCORPORATION OF PHILADELPHIA STOCK EXCHANGE, INC.

FIRST-THIRD No Change

FOURTH:

(a) No Change

(b) (i) - (iii) (A) No Change

(B) In the event that any Person, either alone or together with its Related Persons (as hereinafter defined), at any time owns of record or beneficially, whether directly or indirectly, more than 20% of the then outstanding shares of Common Stock (such shares of Common Stock in excess of such 20% limit being hereinafter referred to as "Excess Shares"), such Person and its Related Persons shall have no right to vote, or to give any consent or proxy with respect to, such Excess Shares, and such Excess Shares shall be deemed not to be present for the purposes of determining whether a quorum is present at any meeting or vote of the stockholders of the Corporation or entitled to vote in determining the number of shares required to be voted for approval of or to give consent with respect to any matter presented to the stockholders of the Corporation. For the purposes of this Certificate, “Related Persons” shall mean (1) with respect to any Person, 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, other than any such agreement, arrangement or understanding pertaining to any of the following (each, an “Exempted Matter”): a merger, sale, acquisition or other corporate affiliation of or by the Corporation or any subsidiary; the sale of all or substantially all of the assets of the Corporation; the issuance, offer or sale by the Corporation and/or one or more shareholders (whether in one or more public or private transactions) of Common Stock of the Corporation; the preparation, filing with the SEC (as hereinafter defined) or dissemination of a registration, proxy or information statement in respect of any of the foregoing; any proposal or plan to do any of the foregoing; or any step that is required for, or specifically and directly related to, any of the foregoing.
As to any matter that is not an Exempted Matter, in determining whether two or more persons are “Related Persons” under clause (3) of the definition thereof, neither (1) 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 Corporation or its shareholders nor (2) 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 Corporation or its shareholders (including, in either such case, by way of voting or otherwise acting as Governors, members of standing or other committees or shareholders) shall create any presumption or inference that such persons have an agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of shares of Common Stock.

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FIFTH-SIXTEENTH No Change

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 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 Phlx 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 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. 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. The 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

Clause (b)(iii)(B) of Article FOURTH provides, in pertinent part, that:

… “Related Persons” shall mean (1) with respect to any Person, 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.

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 SEC approval, is permitted in certain cases. See Article FOURTH (b)(iii) and (v).

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.


The 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

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

i. 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 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.11

ii. 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 SEC, or dissemination of a registration, proxy or information statement in respect of any of the matters or

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.
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.

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.

iii. 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 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, 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 Act in general, and furthers the objectives of Sections 6(b)(5) of the Act in particular,

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12 See Phlx By-Law Article I, Section 1-1(m).
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
proposal is consistent with Section 6(b)(1) of the Act\textsuperscript{15} in that it 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.

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 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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)
(iii) of the Act\textsuperscript{16} and paragraph (f)(3) of Rule 19b-4\textsuperscript{17} thereunder because the Phlx has
designated it as being concerned solely with the administration of the Exchange. At any


\textsuperscript{17} 17 CFR 240.19b-4(f)(3).
time within 60 days of the filing of the 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. Copies of the 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-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.\(^{18}\)

Nancy M. Morris
Secretary

\(^{18}\) 17 CFR 200.30-3(a)(12).