

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43987; File No. SR-Phlx-99-50]

### Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 Amending the Exchange's Certificate of Incorporation

February 20, 2001.

#### I. Introduction

On November 23, 1999, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") submitted to the Securities and Exchange Commission ("Commission") pursuant to section 19(b)(1) of the Securities and Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change. The Phlx filed an amendment to the proposal on December 28, 2000.<sup>3</sup> The proposed rule change was published for comment in the *Federal Register* on January 16, 2001. The Commission did not receive any comment letters with respect to the proposal. This order approves the Exchange's proposal.

#### II. Description of the Proposal

##### A. The Original Filing

The Phlx proposed to amend its Certificate of Incorporation to add Article Nineteenth, relating to the leasing of memberships.<sup>4</sup> A complete copy of the text of Article Nineteenth is available at the Office of the Secretary, the Phlx, and at the Commission.

Proposed Article Nineteenth provides that, in addition to all other powers

granted to the Board by law, the Certificate of Incorporation or otherwise, the Board shall have the power to determine whether, and under what terms and conditions, memberships may be leased, and to adopt by resolution or to set forth in the Rules of the Board such rules with respect to lease agreements, lessors and lessees as the Board may from time to time determine to be advisable. Such rules may include rules regulating and setting forth the rights and obligations of lessors and lessees, the required terms of lease agreements, and the fees, dues, and other charges required to be paid by lessors and lessees (or either of them) to the Exchange in connection with, and for the privilege of, leasing memberships. In addition, proposed Article Nineteenth provides that the Board shall have the power to adopt rules relating to the suspension or termination of any or all lease agreements with respect to memberships, to issue provisional trading privileges on such terms as the Board shall determine to members whose lease agreements are suspended or terminated, and to amend, alter, or repeal any or all of the Rules of the Board with respect to any of the foregoing matters.

##### B. Amendment No. 1

As a non-stock corporation organized under the Delaware General Corporation Law ("DGCL"), the Exchange represented in Amendment No. 1 that it has ample authority to adopt proposed Article Nineteenth. Because the Exchange's Certificate of Incorporation does not require member approval to adopt a charter amendment, proposed Article Nineteenth may be adopted by the Board of Governors without approval by the members of the Exchange (including lessees of memberships) or the owners of memberships (including lessors of memberships). 8 *Del. C.* § 242(b)(3).<sup>5</sup> Therefore, the Exchange's Board adopted Article Nineteenth in accordance with section 242.

Furthermore, section 141(j) of the DGCL empowers the Board to direct the business and affairs of the Exchange, and the Exchange's by-laws give the Board broad power to adopt rules of the Exchange. 8 *Del. C.* § 141(j);<sup>6</sup> By-Law

Art. IV, § 4-4. In addition, existing Article Third of the Phlx Certificate of Incorporation gives the Exchange authority to do all things necessary to run a national securities exchange.<sup>7</sup> Numerous provisions of the Exchange's by-laws and rules already address matters similar to those addressed by proposed Article Nineteenth.<sup>8</sup> Therefore, the adoption of Article Nineteenth falls within the broad authority expressly conferred by Delaware law and existing provisions under the Phlx Certificate of Incorporation.

Pursuant to Article Nineteenth, the Board would have the authority to make rules that impact lease arrangements, including adopting rules relating to the termination of lease agreements. As discussed, the Exchange's Certificate of Incorporation, by-laws and rules already include several provisions addressing such authority.<sup>9</sup> Moreover, the Exchange's by-laws require lessors and lessees (as members) to pledge to abide by the rules as they may be amended from time to time.<sup>10</sup>

The Exchange further represents that proposed Article Nineteenth is also permissible as a matter of Pennsylvania contract law. The provisions of Article Nineteenth authorizing the adoption of rules affecting lease agreements between

or attainment of the business or purposes set forth in its certificate of incorporation").

<sup>7</sup> Article Third states, in part, that the Exchange may operate as and perform all functions of a national securities exchange and engage in any lawful act or activity for which corporations may be organized under the DGCL.

<sup>8</sup> See, e.g., By-Law Art. XV, § 15-1(a) (providing that a membership may be leased in accordance with such rules as the Board may adopt); Rule 930 (setting forth required terms of lease agreement and providing, among other things, that the Exchange may dispose of a membership subject to a lease agreement); Rule 960.1 (providing that all members, member organizations and any persons associated with any member are subject to expulsion, suspension, termination as to activities at the Exchange or any other fitting sanction for violation of the Rules of the Exchange); see also Certificate of Incorporation, Article Twentieth (giving Board plenary authority to assess fees, dues and other charges and to impose penalties, including cancellation of a membership and forfeiture of all rights as a lessor or lessee, for nonpayment).

<sup>9</sup> See, e.g., Certificate of Incorporation, Article Thirteenth (lessor entitled to vote on compromise or arrangement); Certificate of Incorporation, Article Seventeenth (lessor entitled to receive any distribution of assets upon liquidation); By-Law Article I, Section 1-1 (defining lessor and lessee); By-Law Article XII, Section 12-8 (authorizing lessor application fee as fixed from time to time by the Board, lessor initiation fee and fee upon transfer of equitable title to a membership); and Rule 930 (setting forth required terms of lease agreements).

<sup>10</sup> See Exchange By-Law Article XII, Section 12-9. As a condition of the right to lease their seats, lessors agree "to abide by the [Exchange's] By-Laws as they have or shall be from time to time amended, and by all rules and regulations adopted pursuant to the By-Laws." Lessees, as members, likewise make the same commitment.

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

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

<sup>3</sup> See Letter from Cynthia Hoekstra, Counsel, Phlx, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated December 27, 2000 ("Amendment No. 1"). In Amendment No. 1, the Phlx represented that the Phlx's Board has the authority to adopt Article Nineteenth pursuant to Delaware corporate law, Pennsylvania contract law, and the Exchange's Certificate of Incorporation, by-laws, and rules.

<sup>4</sup> In connection with this proposed rule change, the Commission approved a proposed rule change that adopted Article Twentieth. See Securities Exchange Act Release No. 42317 (January 5, 2000), 65 FR 2215 (January 13, 2000) (SR-Phlx-99-48). Article Twentieth provides, in part, that the Exchange's Board of Governors ("Board") shall have the power to assess such fees, dues, and other charges upon members, lessors and lessees of memberships and holders of permits (or any of them) as the Board may from time to time adopt by resolution or set forth in the Rules of the Board. On May 11, 2000 the Commission approved a proposed rule change, which amended Article Twentieth to include the words "owner" and "member organization" and to define the word "owner" to clarify the original intent of Article Twentieth. See Securities Exchange Act Release No. 42773 (May 11, 2000), 65 FR 31622 (May 18, 2000) SR-Phlx-00-30).

<sup>5</sup> Section 242 of the DGCL permits the board of a non-stock corporation to adopt amendments to the corporation's Certificate of Incorporation.

<sup>6</sup> See also 8 *Del. C.* § 121(a) (providing that in addition to powers expressly granted by law or the Certificate of Incorporation, the corporation and its directors may exercise "any powers incidental thereto, so far as such powers and privileges are necessary or convenient to the conduct, promotion

lessors and lessees are lawful because, under the terms of its relationships with both lessors and lessees, the Exchange has the right to adopt by-laws, rules, or regulations that affect those lessors and lessees. Pennsylvania law holds that a contracting party may lawfully exercise its own contractual rights against another party to the contract, even if doing so interferes with the terms of a separate agreement of the other party. Here, the potential suspension or termination of a lease agreement in accordance with the rules of the Exchange is permissible under the terms of the Exchange's separate agreements with each of the parties to the lease agreement.

Both lessors and lessees (as members) agree respectively as a condition of approval of the right to lease seats and as a condition of approval for membership that the Exchange may effectuate changes to their lease agreements, including termination. As a condition of the right to lease their seats, lessors agree "to abide by the [Exchange's] By-Laws as they have or shall be from time to time amended, and by all rules and regulations adopted pursuant to the By-Laws." See By-Law Art. XII, § 12-9(b). Lessees (as members) likewise make the same commitment. See *id.* at 12-9(a). By agreeing to abide by future by-laws, rules, and regulations, lessors and lessees necessarily grant permission to the Exchange to adopt rules pursuant to which their lease agreements may be suspended or terminated. Indeed, the Exchange has already repeatedly exercised its right to adopt rules and by-laws directly impacting lessors and lessees in a variety of rules, including Rule 930, which closely regulates the terms and conditions of lease agreements.<sup>11</sup> Accordingly, Article Nineteenth, which would provide in express form the authorization for the adoption of rules suspending or terminating lease agreements, would simply authorize that which is countenanced by the terms of the Exchange's existing relationship with lessors and lessees, and is thereby permissible as a matter of Pennsylvania contract law.

<sup>11</sup> Other examples include By-Law Art. I, § 1-1 (defining lessor and lessee); By-Law Art. XII, § 12-1 (a member conducts business on the Exchange); By-Law Art. XII, § 12-8 (authorizing lessor application fee, lessor initiation fee, and fees upon transfer of equitable title); By-Law Art. XIV, §§ 14-1, 14-2, 14-5 (the Exchange can impose charges on members, including penalties for non-payment of fees); By-Law Art. XV, § 15-1 (the Exchange approves lessees); Rule 931 (the Exchange approves lessors); Rule 960.1 *et seq.* (the Exchange may discipline members).

Thus, the Exchange believes that proposed Article Nineteenth was properly adopted by the Exchange Board under Delaware law and is permissible as a matter of Pennsylvania contract law.

### III. Discussion

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of section 6 of the Act<sup>12</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>13</sup> In particular, the Commission finds the proposed rule change is consistent with section 6(b)(5) of the Act,<sup>14</sup> in that it promotes just and equitable principles of trade and protects investors and the public interest.

The Phlx represented that it needs Article Nineteenth in order to give the Board the express authorization to adopt specific rules relating to the leasing of memberships, including suspending or terminating lease agreements. The Commission finds that the proposed rule change promotes just and equitable principles of trade and protects investors and the public interest because it enables the Board to determine whether, and under what terms and conditions, memberships can be leased. Furthermore, the Phlx acknowledges that any such rules or resolutions, which are adopted by the Board under Article Nineteenth, shall be filed with the Commission to the extent required pursuant to section 19(b) of the Act.<sup>15</sup>

The Commission is not required under section 19(b)(2) of the Act to find that a proposed rule change by a self-regulatory organization is lawful under state law. In approving this proposal, the Commission is relying on the Phlx's representation that it has the general power under applicable provisions of Delaware corporate law to adopt Article Nineteenth without the approval of members, or by owners, lessors, or lessees of memberships. Furthermore, the Commission is also relying on the Phlx's representation that, under the applicable powers of Pennsylvania contract law, the Phlx has the right to adopt by-laws, rules, or regulation that affect those lessors and lessees contractual relationships. The Commission has not independently evaluated the accuracy of Phlx's

<sup>12</sup> 15 U.S.C. 78f.

<sup>13</sup> In approving this rule, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>14</sup> 15 U.S.C. 78f(b)(5).

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

representations about Delaware or Pennsylvania law.

Thus, the Commission finds that the proposed rule change is consistent with the Act.

### IV. Conclusion

*It Is Therefore Ordered*, pursuant to section 19(b)(2) of the Act,<sup>16</sup> that the proposed rule change (SR-Phlx-99-50), and Amendment No. 1 thereto, are approved.

By the Commission, for the Division of Market Regulation, pursuant to delegated authority.<sup>17</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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**BILLING CODE 8010-01-M**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

#### Environmental Impact Statement: Klickitat and Skamania Counties, Washington and Hood River County, Oregon

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of Intent.

**SUMMARY:** The FHWA is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for a proposed new Columbia River crossing project in Klickitat County or Skamania County, Washington and Hood River County, Oregon. Northern and southern termini for the new crossing would be located in or near the cities of White Salmon and Bingen, Washington, and Hood River, Oregon.

**FOR FURTHER INFORMATION CONTACT:** Michael Kulbacki, Transportation and Environmental Engineer, Federal Highway Administration, 711 S. Capitol Way, Suite 501, Olympia, WA 98501, Telephone: 360-753-9556; or Dale Robins, Project Manager, Southwest Washington Regional Transportation Council, 1351 Officers Row, Vancouver, WA 98661, Telephone: 360-397-6067. Additional information can also be obtained at the project web site: <http://www.rtc.wa.gov/studies/sr35>.

**SUPPLEMENTARY INFORMATION:** The FHWA, in cooperation with the Washington State Department of Transportation, the Southwest Washington Regional Transportation Council, and the Oregon Department of Transportation, will prepare an EIS on

<sup>16</sup> 15 U.S.C. 78s(b)(2).

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