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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48847; File No. SR–Phlx–2003–73]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the Philadelphia Stock Exchange, Inc. Relating to the Demutualization of the Philadelphia Stock Exchange, Inc.

November 26, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 17, 2003, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On November 24, 2003, the Phlx submitted Amendment No. 1 to the proposed rule change.[3] On November 26, 2003, the Phlx submitted Amendment No. 2 to the proposed rule change.[4] 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 Phlx, pursuant to Section 19(b)(1) and Rule 19b–4 thereunder,[5] proposes to: (i) First amend Article FOURTH of its Certificate of Incorporation to eliminate the terms providing that it is ''not for profit'' and that ''no dividend shall ever be paid by the Corporation'' (''Plan of Conversion'' and such amendment to the Certificate of Incorporation, the ''Conversion Amendment''); and (ii) subsequently merge a newly created, wholly-owned shell subsidiary of the Phlx with and into the Phlx, with the Phlx surviving as a ''demutualized''[6] Delaware stock corporation (the ''Merger,'' and together with the Plan of Conversion, the ''Plan of Demutualization'') pursuant to an Agreement and Plan of Merger (''Merger Agreement'').[7] In connection with the Plan of Demutualization, the Phlx will amend its Certificate of Incorporation (''Certificate of Incorporation''), By-laws (''By-laws'') and Rules of the Board of Governors, Option Rules, ITS Rules and Options Floor Procedure Advices (collectively, the ''Rules'').[8] The Phlx will, upon completion of the Demutualization, issue pursuant to the Merger Agreement 100 shares of its Class A Common Stock to each equitable titleholder of an Exchange membership. As discussed more fully below, the Phlx will also issue one share of Series A–1 Preferred Stock, par value $0.01 (''Series A Preferred Stock'') to the ''Phlx Member Voting Trust'' (the ''Trust'') in accordance with an Amended and Restated Trust Agreement (''Trust Agreement'').

The proposed changes to the Certificate of Incorporation, the By-laws and the Rules, as well as the Trust Agreement and the Conversion Amendment are collectively referred to herein as the ''Proposed Rule Change.'' The text of the amendments to the Certificate of Incorporation, By-laws and Rules is available at the Office of the Secretary, the Phlx, and at the Commission.

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 Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements. The text of the proposed rule change is available at the Office of the Secretary, the Phlx, at the Commission, and on the Commission's website.

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 implement the Plan of Demutualization of the Phlx. In connection with such Plan of Demutualization, trading privileges will be separated from corporate ownership of the Phlx and will be made available exclusively through trading permits, as described in greater detail below.[9]

As a result of the Demutualization, the total of 50,500 shares of Class A Common Stock (100 shares per Seat) issued to existing equitable Seat holders will represent 100% of the common equity ownership in the Phlx outstanding immediately after the Demutualization, and all Members and holders of equity trading permits[10] who are affiliated with Member Organizations and are not suspended will be entitled to receive new Series A–1 Permits (described further below) to enable them to continue their activities on the Exchange without interruption. Similarly, Member Organizations will maintain their status upon their compliance with certain deposit and registration requirements, as described in greater detail below.

After the effective date of the Demutualization, the Exchange will continue to be a national securities exchange registered under Section 6 of the Act.[11] Except as will be necessary to implement the new permit structure to replace the existing structure of owning and leasing Seats as a basis for trading rights and Exchange memberships, the

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Letter from Edith Halihan, Deputy General Counsel, Phlx to Nancy Sanow, Assistant Director, Commission, Division of Market Regulation (''Division'') dated November 21, 2003. (''Amendment No. 1''). In Amendment No. 1, the Phlx made technical conforming changes to the exhibits of the proposed rule change.

[4] *See* Letter from Edith Halihan, Deputy General Counsel, Phlx to Nancy Sanow, Assistant Director, Commission, Division dated November 26, 2003. (''Amendment No. 2''). In Amendment No. 2, the Phlx amended the proposed rule change to reflect that on November 25, 2003, the members of the Phlx (as that term is defined in Section I–1(b) of the current By-laws of the Phlx, the ''Members'') approved the Plan of Conversion, the Merger, and all transactions to be effected in connection therewith. Also, on November 18, 2003, holders of equitable title (''Owners'') to memberships in the Phlx (each such membership a ''Seat'') voted to approve the Plan of Demutualization as a whole.

[5] 17 CFR 240.19b–4

[6] This process is also referred to in this notice as the ''Demutualization.''

[7] Under the existing Certificate of Incorporation and By-laws and applicable law, the approval of the Owners is not required to effect the Plan of Demutualization.

[8] In certain limited cases, the proposed rule change also reflects the deletion of obsolete provisions and other necessary updates in the By-laws and the Phlx Rules that are not directly related to the Plan of Demutualization and are summarized in greater detail below.

[9] The Exchange, however, does plan to retain its existing Foreign Currency Option (''FCO'') participations (as defined in Section 1–1(m) of the current By-laws). After the Demutualization, the ability to trade FCOs on the Phlx will also be available through a Series A–1 Permit, as set forth in proposed Rule 908(b).

[10] Pursuant to Rule 23 of the existing Phlx Rules, the Exchange has issued equity trading permits (''ETPs''), four of which are currently outstanding. As described in greater detail below, in the Demutualization, these ETPs will be eliminated in accordance with existing Rule 23 and pursuant to proposed Rule 971, and the rights and privileges of ETPs will be conferred on existing ETP holders by Permits, as described below.

[11] 15 U.S.C. 78f.

Exchange is not proposing any significant changes to its existing operational and trading structure in connection with the Demutualization. Also, the Demutualization will not affect the functions of the Exchange as a self-regulatory organization (''SRO'') and will not affect the designation of the Exchange as ''designated examining authority'' (''DEA'') for the Member Organizations for which the Exchange is the DEA today. In particular, the Exchange is not proposing to make any changes to the existing disciplinary system, fines or the related appellate process in connection with the Plan of Demutualization.[12]

The Exchange proposes to effect the Plan of Demutualization and the Proposed Rule Change for the following reasons: (i) The Phlx is facing significant financial challenges, and without the Demutualization the Phlx's viability in its current operating structure is questionable; (ii) without the Demutualization, the Phlx will be limited, to a large degree, to its current base of Members and Owners as a source of capital and revenue; (iii) the Demutualization of the Phlx will potentially facilitate the Exchange's ability to enter into relationships with strategic or financial partners who may be crucial for the Exchange's future development, capital formation and viability; (iv) the new permit structure may facilitate the introduction of new products on the Exchange and will potentially increase transaction volume and Exchange revenues; and (v) a demutualized Exchange will be better positioned to react to new opportunities and challenges.

In addition to those portions of the Proposed Rule Change which relate directly or indirectly to the Plan of Demutualization, described below under ''Summary of Demutualization—Related Changes,'' the Exchange is also proposing certain other revisions to the By-laws and the Rules as part of the Proposed Rule Change, which are primarily related to the deletion of out-dated or otherwise obsolete provisions in the By-laws and Rules, including changes required to conform the By-laws to requirements under the Act. These changes are summarized below under ''Summary of Non-Demutualization-Related Changes.''

i. Summary of Demutualization-Related Changes

The following summarizes the proposed material changes to the Certificate of Incorporation, the By-laws and the Rules (collectively, the ''Governing Documents'') of the Exchange in connection with the Plan of Demutualization:

A. Capital Structure of the Demutualized Phlx

Changes to the capital structure of the Phlx, as set forth in Article FOURTH of the proposed Certificate of Incorporation, generally reflect the proposed conversion of the Phlx from a non-stock Delaware corporation to a demutualized Delaware stock corporation. As discussed in greater detail below, the single share of the Series A Preferred Stock, issued to the Trust governed by the Trust Agreement, is designed to facilitate the exercise by Members and Member Organizations of their rights to fair representation in the selection and removal of On-Floor Governors of the Exchange and to facilitate the administration of the affairs of the Exchange in accordance with the Act. The voting arrangements implemented through the Trust Agreement and the Series A Preferred Stock are designed to give ''members'' (as defined in Section 3(a)(3)(A) of the Act)[13] a voice in the management of the Exchange after the Demutualization. These arrangements are necessary for two reasons: (i) Under Delaware law, only stockholders can elect the directors of a Delaware corporation; and (ii) after the Demutualization, Members and Member Organizations that were not Owners at the time of the Demutualization will not be stockholders of the Exchange.

Authorized and Issued Capital Stock

Pursuant to Article FOURTH of the proposed Certificate of Incorporation, after the Merger, the authorized capital stock of the Phlx will consist of:

• 50,500 shares of Class A Common Stock;

• 949,500 shares of Class B Common Stock, par value $0.01 per share (''Class B Common Stock,'' and together with the Class A Common Stock, the ''common stock''); and

• 100,000 shares of preferred stock, par value $0.01 per share, one of which will be designated as ''Series A Preferred Stock.''

Upon consummation of the proposed Demutualization, the only capital stock outstanding will be the 50,500 shares of Class A Common Stock and the single share of Series A Preferred Stock. The Exchange proposes to authorize more shares of common stock (in the form of the Class B Common Stock) and preferred stock to allow for a more flexible approach to third-party investments and strategic relationships, which the Exchange believes will be critically important to its survival. Article FOURTH of the proposed Certificate of Incorporation will allow the Board of Governors to create and issue in the future additional classes or series of preferred stock without stockholder approval. In a separate undertaking, however, the Exchange has agreed to submit any such creation and issuance of additional classes or series of preferred stock to the Commission pursuant to Section 19(b) of the Act.[14] The issuance and the sale, transfer or other disposition of the Exchange's capital stock will be subject to certain voting and ownership limitations, described below.

Common Stock

Class A Common Stock and Class B Common Stock. Pursuant to Article FOURTH(b)(i) of the proposed Certificate of Incorporation, the Class A Common Stock and the Class B Common Stock will be identical in all respects and will have equal rights and privileges, except for the right to receive the Contingent Dividend (as defined below). Pursuant to Article FOURTH (b)(vi) of the proposed Certificate of Incorporation, each share of Class A Common Stock will automatically convert into one share of Class B Common Stock on the third anniversary of the closing of the Plan of Demutualization (the ''Dividend Termination Date''). [15] Before the automatic conversion, the proposed Certificate of Incorporation will provide that the Exchange will have to notify the holders of the Class A Common Stock in accordance with certain specific requirements set forth in the Certificate of Incorporation.

Dividends (including the Contingent Dividend). Currently, the existing Certificate of Incorporation provides in Article FOURTH that the Phlx is ''not for profit'' and ''no capital stock shall ever be issued and no dividend shall ever be paid'' by the Phlx. After the

[12] Separately, the Exchange intends to file a proposed rule change to adopt fees applicable to Series A–1 Permits and to make conforming changes to its fee schedule as a result of the Demutualization. Accordingly, the Merger Agreement provides that the effectiveness of the Merger (and thus the Plan of Demutualization in general) will be, *inter alia,* conditioned upon such filing becoming effective or being approved by the Commission, as the case may be.

[13] 15 U.S.C. 78c(a)(3)(A).

[14] 15 U.S.C. 78s(b).

[15] The automatic conversion will be effected as a matter of administrative convenience to consolidate the common stock into a single class after the Contingent Dividend with respect to the Class A Common Stock is no longer potentially payable (*i.e.*, on the Dividend Termination Date). At the time of conversion, because the Contingent Dividend will no longer be potentially payable, the Class A Common Stock and the Class B Common Stock will have identical rights and privileges.

Demutualization, this restriction on paying dividends will be removed and pursuant to Article FOURTH (a)(i) and (b) of the proposed Certificate of Incorporation the Phlx's stockholders will have all dividend and other distribution rights of a stockholder in a Delaware stock corporation (except as may be limited by the rights any preferred stock may have, once issued).

Section 30–4 of the proposed By-laws, however, will prohibit the payment of dividends from any revenues the Phlx derives from regulatory fines, fees or penalties.[16] The Exchange will apply this limitation to its net income, prospectively only, commencing with the fiscal year in which the Merger occurs.[17] To determine the amount of the limitation, the Phlx will first calculate: (i) The amount of regulatory fines, fees and penalties that it has accrued for the fiscal year in which the Merger occurs and later time periods (collectively, ''Regulatory Fee Amount''),[18] and (ii) the amount of regulatory costs and expenses [19] accrued for the same time period (collectively, ''Regulatory Cost Amount''). The Exchange will determine the applicable restriction by determining the excess, if any, of the Regulatory Fee Amount over the Regulatory Cost Amount, and applying that to the amount of its net income for the fiscal year in which the Merger occurs and later periods. This restriction concerning the payment of dividends shall not prevent the Exchange from paying dividends from (i) capital, surplus or retained earnings of the Exchange which were (without regard to this restriction) available for the payment of dividends at the time of the Merger, or (ii) capital contributions or other capital items, in each case, no portion of which is attributable to Regulatory Fees.

Pursuant to Article FOURTH (b)(ii) of the proposed Certificate of Incorporation, the Class A Common Stock will carry with it the right to a contingent dividend (the ''Contingent Dividend'') payable in cash if a Liquidity Event occurs on or before the Dividend Termination Date. A ''Liquidity Event'' will be any investment of net cash proceeds in the Phlx's capital or that of one of its subsidiaries, either by means of a public offering or private placement of the common or preferred stock of the Phlx or the common stock or other securities of the subsidiary. The amount payable as the Contingent Dividend will depend, as follows, on the aggregate amount of net cash proceeds received by the Phlx and/or the subsidiary from all Liquidity Events occurring on or before the Dividend Termination Date:

- If the aggregate net cash proceeds will be at least $50 million but less than $100 million, the amount payable as a Contingent Dividend will be $7,500 for each 100 shares of Class A Common Stock ($3,787,500 in the aggregate).
- If the aggregate net cash proceeds will be at least $100 million but less than $150 million, the amount payable as a Contingent Dividend will be $17,500 for each 100 shares of Class A Common Stock then outstanding ($8,837,500 in the aggregate).
- If the aggregate net cash proceeds will be at least $150 million, the amount payable as a Contingent Dividend will be $29,700 for each 100 shares of Class A Common Stock then outstanding ($14,998,500 million in the aggregate).

If no Liquidity Event occurs on or before the Dividend Termination Date, the right to receive Contingent Dividends will terminate without further action on behalf of the Exchange and the Class A Common Stock will be automatically converted into Class B Common Stock, as indicated above.

Liquidation Rights and Preferences. Currently, Owners have the right to receive all distributions upon a liquidation of the Exchange, on the basis of their pro-rata interest in the Phlx, except as such right may be limited by certain rights of the holders of FCO participations.[20] After the proposed Demutualization, the Phlx common stock will have the right to receive all distributions upon a liquidation of the Phlx, subject to the rights of any preferred stock that may be issued in the future and by the rights of the holder of the Series A Preferred Stock, as described below.

Voting Rights/Election of Directors. Currently, for the most part, non-Member Owners do not have voting rights under the Exchange's existing Certificate of Incorporation, By-laws and Rules with respect to any matters relating to the Exchange, with certain very limited exceptions.[21] After the Demutualization, pursuant to Article FOURTH (b)(iii) of the proposed Certificate of Incorporation, the Phlx common stockholders will vote on all matters on which stockholders are entitled to vote except for the election and removal of the On-Floor Governors and, in the case of a contest for the position, the selection of the On-Floor Vice Chairman of the Exchange.

The holders of the Class A Common Stock and Class B Common Stock will vote together as a single class on all matters, except that: (i) Any amendment, alteration or repeal of any of the provisions of the proposed Certificate of Incorporation that adversely affects the rights, powers or privileges of the Class A Common Stock (but not of the Class B Common Stock) will require the affirmative vote of a majority of the shares of the Class A Common Stock then outstanding, voting separately as a class; and (ii) any amendment, alteration or repeal of any of the provisions of the proposed Certificate of Incorporation that adversely affects the rights, powers or privileges of the Class B Common Stock (but not of the Class A Common Stock) will require the affirmative vote of a majority of the shares of Class B Common Stock then outstanding, voting separately as a class.

In addition, pursuant to Section 22–1 of the proposed By-laws, the By-Laws may be amended by the affirmative vote

[16] For another example of such a restriction, see In the Matter of the Application of The International Securities Exchange LLC for Registration as a National Securities Exchange, Securities Exchange Act Release No. 42455 at Part III.A (February 24, 2000), 65 FR 11388. Securities Exchange Act Release No. 45803 (April 23, 2002), 67 FR 21306 (April 30, 2002) (Restructuring of the International Securities Exchange LLC (''ISE'') from a limited liability company to a Delaware stockholder corporation and to ''demutualize'' by separating the equity interest in the ISE from members'' trading rights).

[17] The rationales for applying this restriction prospectively are: (i) prior to the effectiveness of the Conversion Amendment, the Exchange's Certificate of Incorporation has provided that the Exchange is ''not for profit'' and has prohibited the payment of dividends altogether, and (ii) the Exchange has not compiled, and could not reasonably reconstruct, the information necessary for determining Regulatory Costs and Regulatory Fee Amounts (as defined herein) for prior periods.

[18] Regulatory fines and penalties will include such amounts imposed by the Business Conduct Committee and/or the Board, but not late charges or interest charged. Regulatory fees shall include the Exchange's fees relating to registered representative registration (currently, initial, renewal and transfer fees), as well as its off-floor trader (currently, initial and annual) and examinations fees.

[19] These amounts include costs reasonably related to the Exchange's regulatory function. Specifically, the Exchange intends to include the direct and allocated costs and expenses of the regulatory and enforcement groups as well as an allocation of the direct and allocated costs of technology, legal, compliance and other departments that support the regulatory and enforcement groups and work on regulatory projects. The Exchange's cost allocation methodology includes an employee's compensation and benefits-related costs and the overhead attributable to that employee, such as, for example, occupancy costs, office supplies, and administrative support and an allocation of management costs (again, adding, for example, the secretary's and managers' direct and allocated costs).

[20] *See* Article SEVENTEENTH(c) of the existing Certificate of Incorporation.

[21] In addition, existing contractual arrangements between Owners of Seats or Member Organizations on the one hand and non-Owner Members on the other hand, such as leases or A-B-C agreements, in all but one case contain a provision that may entitle the Seat Owner or the Member Organization, respectively, to direct the Member's vote with respect to the Plan of Demutualization.

of a majority of the entire Board of Governors, or by the affirmative vote of the holders of a majority of the shares of common stock then issued and outstanding, at any regular or special meeting of the Board of Governors or the stockholders (as the case may be). Unlike pursuant to Section 22–1 of the existing By-laws, after the Demutualization, Members (or Member Organizations) will have no right to vote in relation to By-law amendments or to propose By-law amendments. Such change is consistent with the Exchange's proposed post-Demutualization structure as a Delaware stock corporation in accordance with applicable Delaware law.

With respect to management equity awards post-Demutualization, Section 6–1 of the proposed By-laws provides that, the Exchange will not at any time adopt any stock incentive or option plan or arrangement, or any other equity based compensation plan or arrangement, for the benefit of its governors or officers that authorizes the issuance of stock, stock options or any other securities exercisable or exchangeable for or convertible into any equity interest in the Exchange representing more than 10% of the common stock outstanding at such time.

The proposed Article FOURTH (b)(iii)(A) provides also that each stockholder will be entitled to one vote for each share of common or preferred stock held of record on the books of the Phlx, subject to the applicable voting restrictions as described below.

Voting Limitations

In connection with the Demutualization, the Exchange proposes to include certain voting limitations as set forth in Article FOURTH(b)(iii)(B) of the proposed Certificate of Incorporation. The limitations will provide that, if any Person (as defined below) either alone or together with its Related Persons (as defined below), 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''), that Person and its Related Persons will not have any right to vote, or to give any consent or proxy with respect to, the Excess Shares, and the Excess Shares will 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 Exchange. For purposes of the proposed Certificate of Incorporation, ''Related Persons'' means: (i) With respect to any Person, all ''affiliates'' and ''associates'' of such Person (as such terms are defined in Rule 12b–2 under the Act);[22] (ii) with respect to any natural person constituting a ''member'' (as such term is defined in the Act) of the Exchange, any broker or dealer with which such member is associated; and (iii) 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 term ''Person'' will be defined in the proposed Certificate of Incorporation to mean 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.

Notwithstanding the foregoing, a Person, either alone or together with its Related Persons, owning of record or beneficially, whether directly or indirectly, more than 20% of the then outstanding shares of common stock will be allowed to exercise voting rights, and give proxies and consents, with respect to those shares exceeding 20%, provided that: That Person (and its Related Persons owning any common stock) has delivered to the Board of Governors a notice in writing, not less than 45 days (or any shorter period to which the Board of Governors shall expressly consent) before the proposed exercise of its voting rights, of its intention to do so; and

• Before the intended exercise, the Board of Governors has adopted an amendment to the By-Laws adding a provision to expressly permit that Person's exercise of voting rights in excess of 20% and the amendment has been filed with the Commission as a proposed rule change under Section 19(b) of the Act[23] and has become effective.

The Board of Governors will not be permitted to adopt any amendment to the proposed By-laws described in the foregoing paragraph unless the Board of Governors has determined that: (x) The exercise of those voting rights by the Person in question and/or its Related Persons will not impair the Exchange's ability to discharge its responsibilities under the Act and the rules and regulations thereunder and is otherwise in the best interests of the Exchange and its stockholders; (y) the exercise of those voting rights by that Person and/or its Related Persons will not impair the Commission's ability to enforce the Act; and (z) that Person and/or its relevant Related Persons are not subject to any applicable statutory disqualification. In making those determinations, the Board of Governors may impose on the Person in question and its Related Persons such conditions and restrictions as it may in its sole discretion deem necessary, appropriate or desirable in furtherance of the objectives of the Act and the governance of the Exchange. Under the proposed Certificate of Incorporation, however, in no event will a Person who is a Member of the Exchange or a Person affiliated with a Member Organization be permitted to vote shares representing in excess of 20% of the outstanding common stock.

These voting limitations, together with the ownership and notification requirements described below, are intended to establish a system of supervision and control to effectively prevent acquisition of voting power of or assertion of control over the Exchange without the approval of both the Board of Governors and the Commission. In addition, the proposed change to the Certificate of Incorporation is designed to prevent any Member or Member Organization from dominating the Exchange.

Ownership Limitations and Notification Requirements

No Person, either alone or together with its Related Persons, will be allowed to own, of record or beneficially, directly or indirectly, more than 40% of the then outstanding shares of common stock of the Phlx and to the extent any Person (or its Related Persons) purports to own more than 40% of the then outstanding shares of common stock, that Person (and its Related Persons) will not be allowed to exercise any of the rights or privileges incident to the ownership of shares of common stock with respect to the shares exceeding the 40% limit, unless:

• That Person (as well as its Related Persons) has delivered to the Board of Governors a notice in writing, not less than 45 days (or such shorter period to which the Board of Governors expressly consents) before the acquisition of that ownership, of its intention to acquire the ownership; and

• Before the intended exercise, the Board of Governors has adopted an amendment to the By-Laws, adding a provision to expressly permit that Person's ownership in excess of 40% and the amendment has been filed with the Commission as a proposed rule

[22] 17 CFR 240.12b-2.

[23] 15 U.S.C. 78s(b).

change under Section 19(b) of the Act,[24] which has become effective.

The Board of Governors will not be permitted to adopt any amendment to the proposed By-laws described in the foregoing paragraph unless the Board of Governors has determined that: (i) Such acquisition of such ownership by such Person in question and/or its Related Persons will not impair the Exchange's ability to discharge its responsibilities under the Act and the rules and regulations thereunder and is otherwise in the best interests of the Exchange and its stockholders; (ii) such acquisition of such ownership by such Person and its Related Persons will not impair the Commission's ability to enforce the Act; and (iii) that Person and its relevant Related Persons are not subject to any applicable statutory disqualification. In making those determinations, the Board of Governors may impose on the Person in question and its Related Persons such conditions and restrictions as it may in its sole discretion deem necessary, appropriate or desirable in furtherance of the objectives of the Act and the governance of the Exchange.

In addition, no Member, either alone or together with its Related Persons, will be allowed to own, of record or beneficially, directly or indirectly, more than 20% of the then outstanding shares of common stock of the Phlx. To the extent any Member (or its Related Persons) purports to so own more than 20% of the then outstanding shares of common stock, that Member (and its Related Persons) will not be allowed to exercise any of the rights or privileges incident to the ownership of shares of common stock with respect to the shares exceeding the 20% limit.

In making those determinations, as in the case of a By-Law amendment expressly permitting the exercise of voting rights exceeding the 20% limit, the Board will be allowed to impose such conditions and restrictions on that Person and its Related Persons as it may in its sole discretion deem necessary, appropriate or desirable in furtherance of the objectives of the Act and the governance of the Phlx.

Unless the conditions specified above are met, if any Person exceeds the 40% threshold, either alone or together with its Related Persons, the Phlx will have the right, but not the obligation, to purchase from that Person and its Related Persons the shares of common stock that exceed the 40% threshold for a price equal to the par value of the shares of common stock.

If any Member exceeds the 20% threshold, either alone or together with its Related Persons, the Phlx will have the right, but not the obligation, to purchase from that Member and its Related Persons the shares of common stock that exceed the 20% threshold for a price equal to the par value of the shares of common stock. Also, unlike ownership by non-Members in excess of 40%, the proposed Certificate of Incorporation does not contain a proviso allowing for Members to own shares in excess of 20% with appropriate notification and By-law amendment sanctioned by the Commission.

Pursuant to Article FOURTH(b)(iv) and (v) of the proposed Certificate of Incorporation, any Person, either alone or together with its Related Persons, that at any time owns (whether by acquisition or by a change in the number of shares outstanding) of record or beneficially, directly or indirectly, 5% or more of the then outstanding shares of common stock will be required, immediately upon so owning 5% or more of the then outstanding shares of common stock, to give the Board of Governors written notice of that ownership and will be required to update the notice promptly after any ownership change. However, an updated notice will not have to be provided to the Board of Governors in the event of an increase or decrease of less than 1% (of the then outstanding shares of common stock) in the ownership percentage so reported (for that purpose, the increase or decrease will be measured cumulatively from the amount shown on the immediately preceding report) unless such increase or decrease of less than 1% results in the Person's owning more than 20% or more than 40% of the shares of common stock then outstanding (at a time when the Person so owned less than those percentages) or results in the Person's owning less than 20% or less than 40% of the shares of common stock then outstanding (at a time when the Person so owned more than those percentages). These proposed notification requirements will allow the Exchange to fulfill its reporting obligations to the Commission and to better monitor the voting and ownership limitations in the proposed Certificate of Incorporation described above.

Transfer Restrictions. Pursuant to Section 29–1 of the proposed By-laws, no stockholder of the Exchange may sell, transfer (by operation of law or otherwise) or otherwise dispose of any shares of Class A Common Stock except in blocks of 100 shares per sale, transfer or disposition. This transfer restriction is intended to ensure that the number of holders of common stock of the Exchange will not exceed the threshold for having to register the Exchange with the Commission under Section 12 of the Act.[25] The Exchange believes that, at least for some period of time after the Demutualization, the obligation of being a public reporting company would be overly burdensome on the Exchange as compared to the advantages conferred by that status.

In addition, Article XXIX of the proposed By-laws contains other restrictions typical for a Delaware stock corporation to ensure compliance with the Securities Act of 1933, as amended (the ''Securities Act''),[26] and to allow for efficient future marketing of the capital stock by an underwriter in connection with and after a potential initial public offering of shares of capital stock of the Exchange.[27] Accordingly, Section 29–2 of the proposed By-laws provides that after the Demutualization, no sale, transfer or other disposition of the capital stock of the Exchange may be effected except: (i) Pursuant to an effective registration statement under the Securities Act and in accordance with all applicable state securities laws; (ii) upon delivery to the Exchange of an opinion of counsel satisfactory to the Board that such sale, transfer or other disposition may be effected pursuant to a valid exemption from the registration requirements of the Securities Act and all applicable state securities laws; (iii) upon delivery to the Exchange of such certificates or other documentation as counsel to the Exchange shall deem necessary or appropriate in order to ensure that such sale, transfer or other disposition complies with the Securities Act and all applicable state securities laws; or (iv) pursuant to such procedures as the Chairman of the Board (or his designee) may adopt from time to time with respect to such transactions. In addition, no sale, transfer or other disposition of the capital stock of the Exchange may be effected by any holder of such stock until all amounts due and owing by such holder to the Exchange (whether any such amounts relate to such holder's status as a stockholder, Member, participant or Member (or participant) Organization of the Exchange or otherwise) shall have been paid in full.

In addition, Section 29–3 of the proposed By-laws provides that no stockholders may, if requested by the Exchange or any underwriter of equity securities of the Exchange, sell or

[24] 15 U.S.C. 78s(b).

[25] 15 U.S.C. 78l.

[26] 15 U.S.C. 77.

[27] It should be noted that no such transaction is currently contemplated at the time of this proposed rule change.

otherwise transfer or dispose of any shares of capital stock of the Exchange held by such stockholder during the 180-day period following the effective date of a registration statement of the Exchange filed under the Securities Act in respect of that class of capital stock. If requested by the Exchange or any such underwriters, each stockholder will be required to execute an agreement to the foregoing effect. The Exchange may impose stop-transfer instructions with respect to the shares (or securities) subject to the foregoing restriction until the end of said 180-day period.

Series A Preferred Stock/Phlx Member Voting Trust

Designation and Issuance of Series A Preferred Stock to Phlx Member Voting Trust/Trust Agreement. Article FOURTH (b) of the proposed Certificate of Incorporation will designate one share of preferred stock as the ''Series A Preferred Stock.'' The Series A Preferred Stock will have the sole power to (i) select the On-Floor Governors, and (ii) remove the On-Floor Governors in accordance with the procedures described below in connection with the removal of Governors.

As set forth in the Trust Agreement, at the effective time of the Merger, the Exchange will issue the share of Series A Preferred Stock to the Trust. Pursuant to Section 4.1 of the Trust Agreement, the Trustee of the Trust will have to vote the share of Series A Preferred Stock with respect to the designated nominees for election as On-Floor Governors, or the removal of On-Floor Governors, as the case may be, as directed by the vote of the Member Organization Representatives of Member Organizations entitled to vote, as described below.

The purpose of the Series A Preferred Stock is to establish a means by which the vote of the Member Organizations (in their capacities as such) can effectively elect and, subject to certain additional requirements described below, remove the five On-Floor Governors. Under Delaware law, the Governors of a stock corporation can be elected only by stockholders, and Member Organizations (in their capacities as such) will not be stockholders.

Dividend Rights. Because the Series A Preferred Stock will be issued only to enable the non-stockholder Member Organizations to vote indirectly for the On-Floor Governors, Article FOURTH (a)(i) of the proposed Certificate of Incorporation will provide that the Series A Preferred Stock will not have the right to receive any dividends.

Liquidation Preferences. Pursuant to Article FOURTH(a)(ii) of the proposed Certificate of Incorporation, upon liquidation of the Phlx the holder of the share of Series A Preferred Stock will be entitled to receive an amount equal to the par value of the share of Series A Preferred Stock (or $0.01) held by the holder after the payment of, or provision for, obligations of the Phlx and any preferential amounts payable to holders of any other class or series of outstanding shares of preferred stock.

Transferability. Article FOURTH(a)(iv) of the proposed Certificate of Incorporation will provide that the Series A Preferred Stock will not be transferable (whether by sale, pledge, operation of law or any other disposition) without the prior written consent of the Board. If the Board determines that it is in the best interests of the Exchange or its stockholders for any holder of the share of Series A Preferred Stock to sell the share to the Exchange or any other person, the holder will be required under Article FOURTH(a)(iii) of the proposed Certificate of Incorporation to effect the sale as directed by the Board.

B. Corporate Governance of the Demutualized Phlx

According to Article SIXTH of the proposed Certificate of Incorporation and Sections 4–1 and 4–4 of the proposed By-laws, the principal management of the Phlx after Demutualization will continue to rest with the Board and the Standing Committees of the Exchange.

To ensure compliance with the Act in the context of a demutualized Exchange, Article SIXTH of the proposed Certificate of Incorporation will provide that, in managing the business and affairs of the Phlx, the Governors will have to consider applicable requirements for registration as a national securities exchange under Section 6(b) of the Act,[28] including the requirements that (i) the rules of the Phlx be designed to protect investors and the public interest, and (ii) the Phlx be so organized and have the capacity to carry out the purposes of the Act and (except as otherwise provided in the Act or the rules and regulations thereunder) to enforce compliance by its Members and persons associated with its Members with the Act, the rules and regulations thereunder, and the rules of the Phlx.

[28] 15 U.S.C. 78s(b).

Board of Governors—Composition; Eligibility

Article SIXTH of the proposed Certificate of Incorporation, together with Article IV of the proposed By-laws, will set forth the required number and composition of the Board. Pursuant to Section 4–1 of the proposed By-laws, the composition of the Board will be the same as before the Demutualization and, as set forth in Section 4–3(b) of the proposed By-laws, will consist initially of the same individuals in office at the time of the Demutualization. According to Article SIXTH (a) of the proposed Certificate of Incorporation, the Board will continue to have a total of 22 Governors and be composed as follows:

- The Chairman of the Board, who will be the individual then holding the office of Chief Executive Officer (''CEO'');
- 11 Non-Industry Governors (of whom at least five will have to be public Governors); and
- 10 Industry Governors, of which five will have to be On-Floor Governors and five will have to be Off-Floor Governors).

The criteria set forth in the Exchange's current By-laws for eligibility of persons to serve as a Governor within each category of Governor will remain the same after Demutualization.

Board of Governors—Classification and Term Limits

According to Section 4–3(a) of the proposed By-laws, the Board will remain classified, with Governors serving staggered three-year terms. Governors (other than the Chairman) may serve for up to two consecutive three-year terms starting from the effective time of the Merger. In order to preserve continuity post-Demutualization, Section 4–3(b) of the proposed By-laws will provide that Governors who hold their positions at the effective time of the Merger will continue to hold those positions, in their respective classes, until their original terms expire and that the term limits will not take into consideration any service as Governor before the Demutualization but will only apply from and after the effective time of the Merger. The Exchange believes that this provision serves to ensure continuity in the governing body of the Exchange through such a significant corporate event as the Demutualization. The current Board of Governors has considered the Demutualization and the advantages and risks related to it, as well as the future strategy for the Exchange post-Demutualization, for a significant period of time.

Nomination and Election of Governors

The nomination and election procedures of the Phlx will be revised to ensure continuing fair representation for Members and Member Organizations in the context of the demutualized Exchange, while at the same time adapting the Exchange to its proposed status as a demutualized business corporation with stockholders. Generally, the new nomination and election structure of the Exchange will be as follows:

- The Non-Industry Governors, Off-Floor Governors and the Chairman of the Board will continue to be nominated by the Nominating and Elections Committee and will be elected by the holders of the common stock at meetings of stockholders, as described below.
- Stockholders will be permitted to make independent nominations of Non-Industry and Off-Floor Governors upon written notice of the nominations not less than 90 nor more than 120 days before the first Monday in February of each year (or such other date as the Board may establish). These nominations will be subject to review by the Nominating and Elections Committee.

Member Organizations, as described below, will designate the On-Floor Governors in accordance with the following procedures:

- On-Floor Governors will be nominated by the Nominating and Elections Committee from recommendations made: (i) By members of the Nominating and Elections Committee; or (ii) by any Member, participant or Member Organization Representative.
- Independent nominations by Member Organization Representatives will be valid only if signed by Member Organization Representatives representing no less than 50 votes.
- Member Organizations, through their authorized Member Organization Representative, will vote for designated On-Floor Governors among nominees so selected at the annual meeting of Members and Member Organizations.
- Nominees for Governors receiving the highest numbers of votes for the category of Governor for which they were respectively nominated as candidates will be declared the ''Designated Nominees'' for those offices. In case of a tie, the Nominating and Elections Committee will make the selection as to who among the tying nominees shall be designated.
- On-Floor Governors will then be elected by the Trust owning the share of Series A Preferred Stock based on the ''Designated Nominees'' elected by the Member Organization Representatives as described above.

Governors—Vacancies and Removal

In accordance with Section 3–8 of the proposed By-laws, vacancies (including vacancies created by increases in the size of the Board of Governors) will continue to be filled by the Nominating and Elections Committee, upon approval by a majority of the Governors. With respect to the removal of Governors, Article SIXTH(b) of the proposed Certificate of Incorporation and Sections 3–3 and 4–4 of the proposed By-laws will provide that Governors may be removed only for cause or, under certain circumstances, upon recommendation by a majority of the Board of Governors. In addition, Governors may be removed only by a 66⅔% vote of the group that elected them (*i.e.*, the holders of common stock, in the case of the Non-Industry or Off-Floor Governors, or the shares of Series A Preferred Stock as instructed by a vote of the Member Organization Representatives, in the case of the On-Floor Governors).

An On-Floor Governor may be removed at any annual or special meeting. A special meeting for the removal of an On-Floor Governor may be called by the Chairman of the Board of Governors or the Board of Governors or, only in the case of a special meeting of Member Organization Representatives for the purpose of voting on the removal of an On-Floor Governor, by the Member Organization Representatives representing a majority of the then issued and outstanding permits. If such a meeting is proposed to be called by Member Organization Representatives, such Member Organization Representatives must provide the Chairman written notice prior to calling any such meeting stating in reasonable detail the basis for, and the facts and circumstances purported to warrant, such removal of the relevant On-Floor Governor.

Committees

No changes will be made in Board committee structure or composition as part of the Demutualization process, except as follows:

- Pursuant to Sections 10–6 and 10–17 of the proposed By-laws, respectively, at least half of the Admissions Committee and the Foreign Currency Options Committee, respectively, will have to be Members, participants or persons affiliated with Member Organizations or participant organizations;
- Pursuant to Sections 10–20 and 10–16 of the proposed By-laws, respectively, at least half of the Options Committee and the Floor Procedure Committee, respectively, will have to be Members or persons affiliated with Member Organizations;
- Pursuant to Section 10–6 of the proposed By-laws, the Business Conduct Committee will share jurisdiction over the revocation of permits and foreign currency options participations in connection with disciplinary matters with the Admission Committee; and
- Pursuant to Section 10–7(a) and (b) of the proposed By-laws, certain term limits applicable to members of the Allocations Committees will be eliminated.

The existing Governance Documents do not include any specification as to the composition of the Admissions Committee, Foreign Currency Options Committee, the Options Committee or the Floor Procedure Committee and, therefore, do not require the committees to include any Industry Governors. Accordingly, the Proposed Rule Change will ensure participation of Industry Governors in each of these committees, thereby allowing Industry Governors to influence decisions made in vital areas of day-to-day trading operations and membership matters. The elimination of term limits respecting the Allocations Committees is intended to achieve consistency with most other committees, which do not have such limits.

Management and Executive Officers

The management structure of the Exchange, including its executive officers, will remain unchanged in the Demutualization in accordance with Article V of the proposed By-laws. The CEO position will continue to be a full-time position to be appointed by the Board, and the holder of this position will act as its Chairman. The person acting as CEO at the time of the Demutualization will be the only nominee for the position of Chairman of the Board, and will be elected by the votes of the holders of the common stock. The existing requirement that the CEO may not be a partner of a Member (or participant) Organization, nor an employee, agent, consultant, officer, director or stockholder of a Member (or participant) Organization will be retained. The CEO will appoint the other officers of the Exchange.

Limitation of Liability and Indemnification

Articles FIFTEENTH and SIXTEENTH of the proposed Certificate of

Incorporation and Section 4–18 of the proposed By-laws will include provisions substantially similar to the Article EIGHTEENTH of the existing Certificate of Incorporation, in accordance with Section 145 of the Delaware General Corporation Law. Such provisions eliminate the personal liability of Governors (and other persons mentioned below) for monetary damages for breach of fiduciary duty as a Governor, except for liability:

- For any breach of the Governor's duty of loyalty to the Phlx or its stockholders;
- For acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law;
- Under Section 174 of the Delaware General Corporation Law regarding unlawful dividends and stock purchases; or
- For any transaction from which the Governor obtained an improper personal benefit.

The proposed Certificate of Incorporation and By-laws will further permit the Phlx to indemnify to the fullest extent permitted under and in accordance with the laws of the State of Delaware any Governor (or director) or officer of the Phlx, and any person that is or was serving at the request of the Phlx as a Governor, committee member or in-house legal counsel, officer, director (or person in similar position), employee or agent of another corporation or of a partnership (general or limited), limited liability company, joint venture, trust or other enterprise or business entity, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with any action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the Phlx, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful. The Phlx may also pay the expenses of indemnified persons incurred in defending a suit or proceeding in advance of the final disposition of the suit or proceeding. The proposed Certificate of Incorporation will also permit the Phlx to secure insurance on behalf of any officer, director, employee or other agent for any liability arising out of his or her actions in that capacity. The Exchange believes that these indemnification provisions are substantially similar to those generally employed by other Delaware stock corporations and the scope of the persons covered is intended to continue to attract and retain qualified personnel.

C. Permits and Trading Rights

Issuance of Permits and Application Process

Under the proposed Plan of Demutualization, access to the Exchange facilities and the right to trade will be conferred by the newly-issued permits rather than by ownership or leasing of Seats of the Exchange. As discussed above, trading of foreign currency options will continue to be allowed through the existing FCO participations, but, after Demutualization, will also be permitted through permits, as will be provided in proposed Rule 908(c)(i).

Proposed Rule 971 will provide that all ETPs and ETP use agreements will terminate with immediate effect as of the close of trading on the day the Merger becomes effective without any further action on the part of any party thereto. Similarly, proposed Rule 971 will also provide that all leases of Seats and all leases and A–B–C agreements with respect to such Seats, will terminate with immediate effect as of the close of trading on the day the Merger becomes effective without any further action on the part of any party thereto. All provisions in the Certificate of Incorporation, By-laws and Rules relating to the transfer or lease of a Seat or A–B–C agreement, and all defined terms related thereto (such as ''Lessor'' and ''Lessee'') will be amended as necessary to reflect that, after the Demutualization, these provisions and defined terms will only apply to FCO participations. These provisions will no longer be applicable to permits, because permits (including the Series A–1 Permits) will not constitute property that can be transferred by its holder (except within the same member Organization). Similarly, the provisions relating to ETPs, such as Rule 23, will be deleted.

To provide an orderly transition from Seats to permits, proposed Rule 972 will allow each Member (including, without limitation, each holder of an equity trading permit), inactive nominee and Member Organization holding that status immediately before the effective time of the Merger that, at that time, is not subject to any suspension of that status, to maintain that status. All Members and ETP holders who fulfill the requirements described in the previous sentence will receive Series A–1 Permits immediately upon the Demutualization.

Proposed Rule 972 will also provide that existing Member Organizations will maintain their status for a period of 15 days following the Merger. Each Member Organization, however, will have to provide to the Admissions Committee and the Exchange, as applicable, before the end of the 15-day period, the following:

- The security deposit or alternative compliance with proposed Rule 909 (the ''security requirement'') (as described below);
- The form to be filed by the Member Organization's qualifying permit holder; and
- The designation of the Member Organization's Member Organization Representative in the form prescribed by the Exchange.

If a Member Organization fails within that period to comply with the security requirement and/or to furnish the form to be filed by the Member Organization's qualifying Member, the Member Organization's status as such will immediately be suspended. If a Member Organization fails to designate a Member Organization Representative, the Member Organization may not exercise any voting rights with respect to any permits held by persons who are associated with the Member Organization.

Classes or Series of Trading Permits

Immediately after the Demutualization, pursuant to Section 12–1 of the proposed By-laws and proposed Rule 908, there will be only one series of permit, called the ''Series A–1 Permit,'' which will confer upon its holder all the rights and privileges of a Member of the Exchange. An individual will be allowed to hold a Series A–1 Permit if he or she meets the qualification criteria that will be set forth in Article XII of the proposed By-laws and Rules 901 and 908 and/or may be imposed by the Admissions Committee (which criteria the Exchange intends will remain largely the same as they were before the Demutualization), including the requirements that a Member be an individual at least 21 years of age and be associated with a Member Organization.[29] Pursuant to Sections 12–1 and 12–4 of the proposed By-laws and proposed Rule 908(b), Series A–1 Permits will be limited or unlimited in number and may be issued from time to time by the Exchange, as determined by the Board in its sole discretion.

[29] Under Sections 12–2 and 12–4 of the proposed By-laws, Stock Clearing Corporation of Philadelphia (''SCCP''), as an eligible corporation, may hold a permit but will continue not to be subject to the qualification criteria applicable to persons seeking a permit. SCCP, a subsidiary of the Phlx, is a registered clearing agency.

After Demutualization, Section 12–1 of the proposed By-laws will empower the Board to:

• Authorize the issuance of an unlimited or restricted number of additional permits;

• Terminate or eliminate any class or series of permits; and

• Create additional classes or series of permits.

Any of these actions, however, will continue to be subject to Commission review and/or approval. In accordance with Section 12–3 of the proposed By-laws, no person will be allowed to hold more than one permit.

Pursuant to proposed Rule 971, separate equity trading permits currently issued and outstanding will be eliminated and be replaced by the Series A–1 Permits described above.

Qualifications

Initially, except to the extent provided in applicable product and/or activity criteria set forth in the proposed Rules, qualifications and other requirements for Members to conduct certain activities (*e.g.*, to act as a specialist or a floor broker), to trade certain products (*e.g.*, special capital requirements for specialists for certain equity securities, allocation of books and Registered Options Trader assignments) or to use specific facilities of the Exchange (*e.g.*, testing requirements for use of certain Exchange technology) will remain largely the same as they were before the Demutualization.

Member Organizations and Member Organization Representatives

As under the current structure, a Member will continue to be permitted to be associated with more than one Member Organization.[30] In accordance with proposed Rule 908(c)(ii), each holder of a permit will be obliged, however, to designate only a single eligible organization with which the Member is associated as the Member's ''primary affiliation'' for the purposes of voting, as will be provided in Article III of the proposed By-laws. A Member will be allowed to qualify as a Member Organization only the entity the Member has designated as his or her primary affiliation. Accordingly, every Member shall have one primarily-affiliated Member Organization and may have more than one associated Member Organization.

Unlike the current Phlx regime, after Demutualization, individual Members will not directly be accorded voting rights. Rather, in regard to the election and removal of On-Floor Governors, Member Organizations will be entitled to exercise voting rights in respect of the permits held by those Members who have designated the Member Organization as their primary affiliation. Specifically, pursuant to proposed Rule 921 and Section 12–8 of the proposed By-laws, each Member Organization will have to register with the Exchange and designate a single individual as its ''Member Organization Representative.'' The concept of a Member Organization Representative is designed to facilitate the post-Demutualization voting process. Permit holders, or Members, themselves will not exercise any voting rights. Instead, voting rights associated with a permit will be exercised by the Member Organization with which the Member is primarily associated and, as noted above, will be exercised by the Member Organization's Member Organization Representative. The Member Organization Representative will be the only person who may exercise the voting rights in respect of the Member Organization in respect of matters on which Member Organizations may vote. Proposed Rule 921 will also provide that a Member Organization Representative will have to accept the designation by filling out a registration documentation required by the Exchange.

Pursuant to proposed Rules 921 and 972, with the exception of certain provisions in proposed Rule 921(c) retaining the existing concept of ''inactive nominees'' in order to alleviate hardships, failure to qualify a Member Organization Representative at any time will prevent a Member Organization from exercising any rights in connection with the Exchange, including the right to vote for designated On-Floor Governors as described below.

According to proposed Rule 924, Members[31] will be liable with respect to any fees, fines, dues, penalties or other amounts imposed by the Exchange in connection with such Member's permit or any activities conducted in connection with such permit, whether or not any such obligation was incurred on behalf of his account or on behalf of his Member Organization. In addition, proposed Rule 924 will provide that Member Organizations will be liable with respect to any fees, fines, dues, penalties or other amounts imposed by the Exchange in connection with such Member Organization and any Member associated with such Member Organization in connection with a permit or any activities conducted in connection with such permit by such member on behalf or for the account of such Member Organization. Under proposed Rule 924(b), similar to the rule in effect today, Member Organizations will have the ability to allocate responsibilities among themselves regarding Members associated with more than one Member Organization, provided that any such arrangements have been provided to the Exchange in the form required by it at least 30 days prior to their desired effectiveness.

Security Requirement

According to proposed Rule 909, each Member Organization will have to provide and maintain security to the Exchange (or alternative compliance) for the payment of any claims owed to the Exchange, to SCCP, and to Members and/or other Member Organizations. Currently, Section 14–5 of the By-laws provides that the Exchange (through the Admissions Committee) may dispose of any Seat upon written notice if amounts owed to the Exchange exceed a certain threshold amount and have been outstanding for at least one year, which possibility will be eliminated in connection with the elimination of Seats in the Demutualization. Accordingly, the Exchange proposes the security requirement to protect itself in the case of non-payment of certain amounts owed. The proposed security requirement will consist of:

(i) Excess net capital of at least the amount required by the Exchange, as will be published by the Exchange from time to time;[32]

(ii) an acceptable guaranty by a clearing Member Organization that is acceptable to the Exchange; or

(iii) a deposit with the Exchange in an amount not to exceed $50,000.

The amount of the security for a Member Organization will remain the same regardless of the number of permits issued to affiliates of the Member Organization. If a Member Organization's registration is terminated and no Members remain associated with the Member Organization, the Exchange will be permitted to apply the proceeds of any remaining security to the payment of any amounts owed by or on behalf of the Member Organization to, or claimed by, the Exchange, to SCCP, and to other Member Organizations, and any balance of the security thereafter remaining will be returned to the Member Organization or, in the case of

[30] *See* Rule 793.

[31] This rule also applies to FCO participants and participant organizations with respect to FCO participations.

[32] In accordance with the By-laws and Rules, the Member Organization will be subject to monthly reporting obligations to evidence the maintenance of that excess net capital requirement.

a guaranty, the guaranty will be returned to the guarantor Member Organization.

The proposed By-laws will also provide in Section 12–9(b) that following the Demutualization, Members, Member Organizations and holders of FCO participations will have to pledge in writing to abide by the proposed Certificate of Incorporation, the proposed By-laws, the proposed Rules and any other rules and regulations of the Exchange.

Voting Rights

After the Demutualization, holders of permits will not have any voting rights. Member Organizations will have the right to:

• Designate the five On-Floor Governors for election to the Board in accordance with Section 3–12 of the proposed By-laws;

• Remove the On-Floor Governors in accordance with Sections 3–2(c) and 3–3 of the proposed By-laws (together with the right to designate the On-Floor Governors, the ''Designation Rights''); and

• Designate the On-Floor Vice-Chair in a contested election as described below.

Each permit will carry one vote. As discussed above, the vote may be exercised only by the qualified Member Organization Representative of a Member Organization designated by a holder of a permit as its primary affiliation.

The Designation Rights will be exercised in accordance with the following procedure:

• Based on input from the membership or others, the Nominating and Elections Committee will propose a slate of qualified On-Floor Governors;

• In addition, the Member Organization Representatives, representing at least 50 permits, will be permitted to propose qualified alternative candidates;

• The Member Organization Representatives, at an annual meeting of Members and Member Organizations, will then elect the designated On-Floor Governors from among the Nominating and Elections Committee's slate and any qualified individuals nominated by Member Organization Representatives in accordance with the nomination procedures.

The winners of this election will then be eligible for designation as On-Floor Governors. In compliance with Delaware corporate law, the designated On-Floor Governors will be formally elected by the Trust that holds the single outstanding share of Series A Preferred Stock in accordance with Article FOURTH(a)(iii) of the proposed Certificate of Incorporation.

Contested Election of the On-Floor Vice Chairman

With respect to the election of the On-Floor Vice Chairman, Section 4–2 of proposed By-laws will provide that, if there is a contest for the position of On-Floor Vice Chairman of the Board, the On-Floor Vice Chairman of the Board may be selected from the On-Floor Governors by a vote of the Member Organization Representatives, as promptly as possible after the annual meeting of stockholders at a special meeting of Members and Member Organizations called for that purpose.

Voting Concentration Limits

In order to prevent any group of Members of Member Organizations from dominating elections of the Member Organization Representatives, the proposed By-laws will provide in Section 3–12(c) that if any Member Organization, directly or indirectly, possesses the right to vote more than 20% of the then outstanding permits, that Member Organization will not have any right to vote, or to give any consent or proxy with respect to, any permits exceeding the 20%, and the excess permits will not be considered present for the purposes of determining whether a quorum is present at any meeting or vote of the Members or Member Organizations, and will not be entitled to vote in determining the number of permits required for a quorum or to be voted for approval of or to give consent with respect to any matter presented to the Members or the Member Organizations.

Member and Member Organization Meetings and Actions

Pursuant to Section 3–2 of the proposed By-laws, annual meetings of Members and Member Organizations will be held on the second Monday in March of each year to designate nominees for On-Floor Governors. Except as described above with respect to a special meeting called for the purpose of removing an On-Floor Governor, special meetings of Members or the Member Organization Representatives may be called at any time only by the Chairman of the Board or by a majority of the Board.

At all meetings of Members and Member Organizations, each Member Organization Representative may cast his vote in person or by proxy, provided that no action will become effective unless there shall have been voted a majority of the number of permits outstanding at such time, not including any Excess Permits, as defined in Section 3–12(c) of the proposed By-laws. Each Member Organization Representative may cast the number of votes equal to the number of permits held by Members having designated the Member Organization Representative's Member Organization as its primary affiliation (subject to the voting restrictions described above).

Section 3–11 of the proposed By-laws will provide that notice of any meeting of Members and Member Organizations must be given to each Member Organization Representative entitled to vote at such meeting not less than 10 days nor more than 50 days before the date of the meeting.

Term and Termination of Permits

Pursuant to proposed Rule 908(e), the holder of a permit will be allowed to terminate the permit at any time upon written notice to the Exchange. The Exchange will be allowed to terminate any individual permit in accordance with the By-laws and Rules of the Exchange only upon:

• The non-payment of any dues, foreign currency options users' fees, fees, fines, penalties, other charges, and/or other monies due and owed the Exchange;

• The insolvency of a Member or Member Organization (or if the Business Conduct Committee has determined the Member or Member Organization to be financially unsafe to continue trading); or

• The Exchange's imposition of a disciplinary sanction.[33]

The terminating permit holder and each Member Organization with which the holder is associated will remain responsible for all obligations of the terminating Member, including, without limitation, all applicable dues, fees, charges, fines, penalties and other obligations arising from the holding or use of a permit before its termination.

Pursuant to proposed Rule 908(f), the Exchange will be able to terminate the entire series of Series A–1 Permits on no less than 60 days' notice to the permit holders. If, however, within six months after any such termination of the entire series of Series A–1 Permits, the Exchange issues any other class or series of permit with respect to any securities product previously covered by the Series A–1 Permit, any permit holder of a terminated Series A–1 Permit, who meets the applicable eligibility requirements with respect to such new class or series of permit, will be entitled to receive on terms no less favorable

[33] *See* Section 14–1 and Articles XVII and XVIII of the proposed By-laws.

than those applicable to other persons such new class or series of permit so long as such permit holder will trade with such new class or series of permit such product in the same capacity as he had done with a Series A–1 Permit before such termination (but only if he had continuously traded such product in such capacity for at least one year prior to such termination). In addition, such holder of the terminated Series A–1 Permit will be required to apply for such new permit within 30 days of the later to occur of (i) the termination of the series of Series A–1 Permits or (ii) the initial issuance of the new class or series of permit.

Transfer of Permits

Section 12–1(b) of the proposed By-laws, as well as proposed Rule 908(h) will also provide that, unless the Board resolves otherwise, no permit may be sold, transferred (by operation of law or otherwise), leased or otherwise encumbered by any person to whom such permit is issued by the Exchange. However, proposed Rule 908(h) provides that the existing concept of ''inactive nominees'' will be retained to alleviate certain administrative hardships for Member Organizations, such that a permit can be transferred to and from an inactive nominee.

Disciplinary Actions and Appeal Process

Enforcement of any disciplinary action and appeals against the same will be conducted in the same manner as before the Demutualization.

Fees, Dues and Charges

Currently, the Board of Phlx has the authority to set fees, dues and other charges [34] in its sole discretion, subject to the requirements under the Act, including filing requirements. Pursuant to lease agreements, Members who lease Seats from Owners are ordinarily required to make lease payments in respect of the lease.

After the Demutualization, the Board of the Phlx will continue to have the authority to set Member fees, dues and other charges in its sole discretion in accordance with Section 14–1 of the proposed By-laws. However, seat leases and lease payments (other than with respect to FCO participations) will no longer exist. All other Exchange charges in effect at the time of the Demutualization will continue to apply until changed.[35] Of course, all fees are subject to change, both before and after Demutualization, subject to approval by the Board and filing with the Commission.

In connection with the Demutualization, the Exchange proposes to make certain corresponding changes to the defined terms applicable to its By-laws and Rules. These changes, reflected in Section 1–1 of the existing and the proposed By-laws, as well as in Rules 1 through 21 of the existing Rules and 1 through 22 of the proposed Rules, are generally [36] designed to adapt such defined terms to the proposed post-Demutualization structure of the Exchange, as described herein.

ii. Summary of Non-Demutualization-Related Changes

Certain aspects of the Proposed Rule Change are not directly related to the Plan of Demutualization. These changes are principally of a clean-up nature, intended to delete obsolete provisions that relate mainly to membership, in the interest of clarity and to avoid confusion post-Demutualization.

Definition of Member Firm, Member Corporation and Member Organization

The Exchange proposes to harmonize the use of the defined terms Member Firm, Member Corporation and Member Organization throughout its By-laws and Rules by eliminating the separate defined terms ''Member Firm'' (Rule 3 of the existing Rules) and ''Member Corporation'' (Rule 4 of the existing Rules) and amending the defined term ''Member Organization'' (Rule 6 of the existing Rules and Rule 3 of the proposed Rules) to include any Member Firm and Member Corporation, as they were previously defined. Wherever such defined terms appear in either the By-laws or the Rules, the Exchange proposes to make the corresponding change to Member Organization. The Exchange believes that these changes eliminate certain definitional inconsistencies.

Convertible Memberships

The Exchange proposes to delete the parts of Article XII of the existing By-laws that relate to ''convertible memberships'' on the Exchange, together with any references to any classes of memberships that existed in connection with the Exchange's pre-1975 status as an unincorporated entity. No such convertible membership has been outstanding at any time and any transitional rules relating to the Exchange's previous unincorporated status are obviously no longer required.

Commissions

The Exchange proposes to delete Article XIX of the existing By-laws in its entirety, which relates to certain requirements for fixed rates of commissions for transactions effected on or by the use of the facilities of the Exchange. The Exchange believes these provisions do not comport with Section 6(e) of the Act.[37] To avoid confusion, they should, therefore, be deleted without replacement. The Exchange also proposes to delete the related Rule 248.

Market-Maker Membership

The Exchange proposes to delete Article XXIII of the existing By-laws, relating to Market-Maker Memberships, in its entirety. No such Market-Maker Membership has been issued since the 1970s and none is currently outstanding. Following the Demutualization, the Exchange is not initially proposing to create a specific permit for market-makers; any rights and privileges required to engage in market making on the Exchange will initially be granted through the proposed Series A–1 Permit. The Exchange also proposes to delete the related Rules 456–459. These deletions are intended to avoid confusion with respect to these unused membership-related provisions.

Exchange Options Trading

The Exchange proposes to delete Article XXVI of the existing By-laws, relating to Exchange options trading through a classification of membership named ''Options Membership'' in its entirety. No such Options Membership has at any time been issued and outstanding. Following the Demutualization, the Exchange is not initially proposing to create a specific permit to trade options on the Exchange; any rights and privileges required to engage in trading options on the Exchange will initially be granted through the proposed Series A–1 Permit. Accordingly, this deletion is also intended to avoid confusion.

References to the Exchange's Constitution

The Exchange proposes to delete references to the ''Constitution of the Exchange'' from the Rules 111, 201A

[34] According to the Exchange, the existing and proposed By-laws and Rules may refer to ''dues, fees and other charges'' to cover various types of monies owed to the Exchange, however, no substantive difference is intended.

[35] Separately, with the elimination of Seats and leases thereof, the Exchange intends to file a proposed rule change to adopt fees applicable to Series A–1 Permits and to make conforming changes to its fee schedule as a result of the Demutualization.

[36] See the discussion of the changes to the definitions of Member Organization, Member Firm and Member Corporation below.

[37] 15 U.S.C. 78f(e).

and 960.2 as well as from the commentary to Rule 803. Where applicable, the references will be either deleted in their entirety or will be replaced by references to the Certificate of Incorporation. The Exchange has not had a constitution since its incorporation in 1972 and, since that time, has been governed exclusively by its Certificate of Incorporation and By-laws.

References to the Exchange's President

The Exchange proposes to delete references to the Exchange's "President" from the Rules and replace such references with "Chairman of the Board of Governors." The Exchange has not established the position of a President and has no immediate plans to establish such a position after the Demutualization.

Participation in Mandatory Decimalization Testing

The Exchange proposes to delete Rule 650 in its entirety which relates to the mandatory participation of Members in certain programs concerning the testing of the Exchange's system in connection with decimalization. Such tests have been performed, and, therefore, Rule 650 has become obsolete.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act [38] in general and, in particular, furthers the objectives of Sections 6(b)(2),[39] 6(b)(3),[40] 6(b)(5) [41] and 11(A)(a)(1) [42] of the Act. Specifically, after careful consideration, the Exchange believes that the proposed permit structure to be established in connection with the Plan of Demutualization should further general access for any registered broker or dealer or natural person associated with a registered broker or dealer to become a member of the Phlx in accordance with Section 6(b)(2) of the Act.[43] Under its current structure, Seats on the Exchange, to which the right to be a member of the Exchange is linked, are limited in number to 505.[44] Under Section 12–1 of the proposed By-laws, the Exchange will be entitled to issue a potentially unlimited number of permits [45] to qualified individuals. Consequently, the potential availability of a number of permits greater than 505 would allow more qualified brokers and dealers to become Phlx Members.

The Exchange further believes that the proposed provisions of the Certificate of Incorporation, the By-laws and the corresponding provisions of the Trust Agreement should assure the fair representation of its Members and Member Organizations in the selection of its Governors and the administration of its affairs by providing that the On-Floor Governors shall be elected by the Trust as a holder of the share of Series A Preferred Stock at the direction of the Member Organization Representatives who represent both the Member Organization that designated them, and, indirectly, the Member Organization's primarily affiliated Member(s). This election process, together with the composition of the Board and the various standing committees of the Board, should ensure fair representation by both upstairs Member Organizations and the Exchange floor in accordance with Section 6(b)(3) of the Act.[46] Article SIXTH of the proposed Certificate of Incorporation, together with Section 4–1 of the proposed By-laws, will continue to provide for five Governors of the Exchange to be "On-Floor" Governors, which will consist of:

- Two Governors who are industry Governors and are members [47] primarily engaged in business on the Exchange's equity floor;
- One Governor who is an industry Governor and is a Member primarily engaged in business as a specialist on the Exchange's equity options floor;
- One Governor who is an industry Governor and is a Member primarily engaged in business as a Registered Options Trader on the Exchange's equity options floor; and
- One Governor who is an industry Governor and is a Member primarily engaged in business on the Exchange's equity options floor as a floor broker.

There will also be five "Off-Floor" Governors who are industry Governors and are 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. These Off-Floor Governors will be elected by the owners of the common stock of the Exchange. In addition, pursuant to the proposed By-laws, at least half of the members [48] of the Admissions Committee and the Foreign Currency Options Committee will be required to be Members, participants or persons affiliated with Member Organizations or participant organizations, and at least half of the members of the Options Committee and the Floor Procedure Committee will be required to be Members or persons affiliated with Member Organizations, which should ensure Member participation and influence over core governance decisions of the Exchange in areas of importance to the Members and Member Organizations. The Exchange also believes that the proposal is consistent with Section 6(b)(5) of the Act,[49] in that the Exchange will continue to offer a marketplace for the trading of securities that is designed to promote just and equitable principles of trade, prevent fraudulent and manipulative acts and practices, remove impediments to and perfect the mechanism for a free and open market and a national market system, as well as to protect investors and the public interest.

In general, the Exchange believes that the Plan of Demutualization is consistent with the findings of Congress expressed in Section 11A of the Act [50] that, *inter alia*, the securities markets are an important national asset which must be preserved and strengthened and that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure economically efficient execution of securities transactions. Under its current mutual structure, the Exchange will be severely hindered in its ability to address the financial and competitive challenges it is facing today. To keep pace with technological and other market changes, develop new products, react swiftly to competitors while continuing to comply with its statutory requirements as a self-regulatory organization, the Exchange believes that it will depend on both internal and external sources of capital. The Plan of Demutualization removes obstacles to third-party investments by creating a

[38] 15 U.S.C. 78f(b).

[39] 15 U.S.C. 78f(b)(2).

[40] 15 U.S.C. 78f(b)(3).

[41] 15 U.S.C. 78f(b)(5).

[42] 15 U.S.C. 78kA(a)(1).

[43] 15 U.S.C. 78f(b)(2).

[44] One of the 505 Seats is held by SCCP pursuant to Section 12–3 of the existing By-laws and, therefore, is not otherwise available.

[45] Each series of permits issued by the Exchange may either be restricted or unlimited in number, as determined by the Exchange.

[46] 15 U.S.C. 78f(b)(3).

[47] Solely in connection with these composition requirements, "members" in each case includes general partners, executive officers (vice president and above) or Members associated with Member Organizations primarily engaged in the relevant business on the Exchange.

[48] Here, the term "member" is used merely to refer to persons serving on a committee.

[49] 15 U.S.C. 78f(b)(5).

[50] 15 U.S.C. 78k(A).

''currency'' (common stock or preferred stock in a for-profit corporation) for the investments, subject to the control and approval of the Commission in the case of preferred stock and if certain ownership or voting thresholds are exceeded. On the other hand, the Plan of Demutualization and the new permit structure also facilitate the fair and reasoned assessment of Members and Member Organizations through a targeted permit fee structure and a potentially unlimited number of Permits.

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

The Exchange does not believe that the proposed rule change would impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

First, on September 29, 2003, a letter addressed to the Exchange's Board questioned the motives and necessity to demutualize.[51] Thereafter, on October 22, the same persons requested the ''demutualization package'' and criticized the scheduling of multiple (as opposed to a single) Member and Owner meetings.[52] The Exchange's response letter explained that the materials would be distributed by the next day and that multiple meetings were intended as a scheduling convenience to permit more Members and Owners to attend.[53] Lastly, although not a comment to the Exchange directly, a letter dated October 30, 2003, addressed to Members/Owners of the Phlx, was circulated, stating, among other things, that the Plan of Demutualization is not fair, did not involve Member or Owner input, and urges Members and Owners to vote against it.[54] It also criticizes the elimination of the ability of Members to propose By-law changes and states that the Plan rewards management with up to 10% of the outstanding stock. The Exchange determined to respond to the letter, explaining, among other things, that the reason for the elimination of the Members' right to petition changes to the By-laws is that Delaware law requires that stockholders amend the By-laws. Furthermore, the Exchange's response explains that the 10% limitation is a ceiling, and not a guarantee.

[51] *See* letter from Joseph D. Carapico, Andrew W. Snyder and Richard B. Feinberg, Penn Mont Securities, to the Board, dated September 29, 2003.

[52] *See* letter from Joseph D. Carapico, Andrew W. Snyder and Richard B. Feinberg, Penn Mont Securities, to Murray L. Ross, Secretary, Phlx, dated October 22, 2003.

[53] *See* letter from Murray L. Ross, Secretary, Phlx, to Joseph D. Carapico, Andrew W. Snyder and Richard B. Feinberg, Penn Mont Securities, dated October 22, 2003.

[54] *See* letter from Richard B. Feinberg, dated October 30, 2003.

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

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 Exchange 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.

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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. 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 will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to file number SR-Phlx-2003–73 and should be submitted by December 24, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[55]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–30062 Filed 12–2–03; 8:45 am]

BILLING CODE 8010–01–P

[55] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3558]

State of West Virginia; Amendment #1

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency, effective November 22, 2003, the above numbered declaration is hereby amended to include Boone, Calhoun, Clay, Fayette, Gilmer, Greenbrier, Marion, McDowell, Mercer, Monongalia, Monroe, Raleigh, Summers, Webster, Wetzel and Wyoming Counties as disaster areas due to damages caused by severe storms, flooding and landslides occurring on November 11, 2003, and continuing.

In addition, applications for economic injury loans from small businesses located in the contiguous counties of Doddridge, Harrison, Lewis, Marshall, Pocahontas, Preston, Randolph, Ritchie, Taylor, Tyler, Upshur and Wirt in the State of West Virginia; Monroe County in the State of Ohio; Fayette and Greene Counties in the Commonwealth of Pennsylvania; and Alleghany, Bath, Bland, Buchanan, Craig, Giles and Tazewell Counties is the Commonwealth of Virginia may be filed until the specified date at the previously designated location. All other counties contiguous to the above named primary counties have been previously declared.

The number for economic injury for the Commonwealth of Pennsylvania is 9Y1900 and for the Commonwealth of Virginia is 9Y2000.

All other information remains the same, *i.e.*, the deadline for filing applications for physical damage is January 20, 2004, and for economic injury the deadline is August 23, 2004.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008).

Dated: November 25, 2003.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 03–30098 Filed 12–2–03; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3559]

Commonwealth of Puerto Rico; Amendment #1

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency, effective November 24, 2003, the above numbered declaration is hereby