

determinations, to explicitly state that the Listing Hearing and Review Council ("Listing Council") or the NASD Board, as part of its respective review, may consider, among other things, any action by an issuer during the review process that would have constituted a violation of Nasdaq's corporate governance requirements had the issuer's securities been listed on Nasdaq at the time.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the NASD<sup>5</sup> and, in particular, the requirements of 15A(b)(6) of the Act<sup>6</sup> and the rules and regulations thereunder because it clarifies procedures for review of listing determinations. The proposed rule change is designed to place an issuer more clearly on notice that any action on its part during the review process that would constitute a violation of Nasdaq's corporate governance requirements, had the issuer's securities been listed on Nasdaq at the time, may be considered by the Listing Council or NASD Board as part of its respective review.

It is therefore ordered, pursuant to section 19(b)(2) of the Act<sup>7</sup>, that the proposed rule change (File No. SR-NASD-2003-23) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49110; File No. SR-NASD-2003-184]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Require Members To Review and Update Executive Representative Contact Information on a Quarterly Basis

January 21, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 8, 2003, the National Association of Securities Dealers, Inc. ("NASD"), 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 NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD is proposing to require members to review and, if necessary, update their executive representative ("Representative") contact information on a quarterly basis. The text of the proposed rule change is below. Proposed new language is in italics.<sup>3</sup>

#### 1000. MEMBERSHIP, REGISTRATION AND QUALIFICATION REQUIREMENTS

\* \* \* \* \*

#### 1150. Executive Representative

*Each member must review and, if necessary, update its executive representative designation and contact information as required by Article IV, Section 3 of the NASD By-Laws within 17 business days after the end of each calendar quarter.*

\* \* \* \* \*

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

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

<sup>3</sup> The Commission notes that NASD filed the proposed rule change with a typographical error in the proposed rule text. In this instance, because the error was technical in nature, the Commission did not require NASD to file an amendment to the proposed rule change. In the future, the Commission expects that NASD will carefully review proposed rule changes before filing them with the Commission to ensure their accuracy.

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

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. NASD has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

###### 1. Purpose

Under Article IV, section 3 of the NASD By-Laws, members must appoint and certify to NASD one Representative to represent, vote, and act for the member in all affairs of NASD. The Representative must be a member of senior management and a registered principal of the member. In addition, the Representative is required to maintain an Internet electronic e-mail account for communication with NASD and must update firm contact information.

Given the important role of the Representative in representing, voting, and acting for the member, NASD believes that members should review and update the Representative designation and contact information periodically to ensure its accuracy. Accordingly, the proposed rule change would require that each member conduct a review and, if necessary, update its Representative information on a quarterly basis, specifically within 17 business days after the end of each calendar quarter. NASD is examining different methods of reminding members of their need to review and update their Representative information on a quarterly basis, including the possibility of a Web page linked to the act of filing the FOCUS report that would prompt members to update such designation and contact information and/or through e-mail reminders to the firm.

###### 2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act<sup>4</sup>, which requires, among other things, that NASD's rules be designed to prevent fraudulent and manipulative acts and

<sup>4</sup> 15 U.S.C. 78o-3(b)(6).

<sup>5</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>6</sup> 15 U.S.C. 78o-3(b)(6). Section 15A(b)(6) requires that the rules of a registered national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

<sup>7</sup> 15 U.S.C. 78s(b)(2).

<sup>8</sup> 17 CFR 200.30-3(a)(12).

practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that this proposed rule change will ensure that members' Representative contact information is accurate and that NASD can timely contact members.

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

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

Comments were neither solicited nor received.

### **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 NASD 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 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. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-NASD-2003-184. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. 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 NASD. All submissions should refer to file number SR-NASD-2003-184 and should be submitted by February 17, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-49098; File No. SR-PHLX-2003-73]

#### **Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 3 Thereto Relating to the Demutualization of the Philadelphia Stock Exchange, Inc.**

January 16, 2004.

#### **I. Introduction**

On November 17, 2003, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to: (1) Amend its Certificate of Incorporation to eliminate a reference to "not for profit" and a restriction on the payment of dividends ("Plan of Conversion" and such amendments to the Certificate of Incorporation, the "Conversion Amendment"); and (2) merge a newly-created, wholly-owned shell subsidiary of the Phlx with and into the Phlx, with the Phlx surviving as a demutualized Delaware stock corporation ("Merger" and together with the Plan of Conversion, the "Plan of Demutualization") pursuant to an Agreement and Plan of Merger ("Merger Agreement"). On November 24, 2003, the Phlx submitted Amendment No. 1 to

the proposed rule change.<sup>3</sup> On November 26, 2003, the Phlx submitted Amendment No. 2 to the proposed rule change.<sup>4</sup> On December 3, 2003, the proposed rule change was published for comment in the **Federal Register**.<sup>5</sup> On December 29, 2003, the Phlx submitted Amendment No. 3 to the proposed rule change.<sup>6</sup> The Commission received one comment letter in response to the proposed rule change.<sup>7</sup> This order approves the proposed rule change.

### **II. Description of Proposed Rule Change**

The purpose of the proposed rule change is to implement the Plan of Demutualization. In connection with the Plan of Demutualization, trading privileges will be separated from corporate ownership of the Phlx and will be made available exclusively through trading permits.<sup>8</sup>

As a result of the demutualization, a total of 50,500 shares of Class A Common Stock (100 shares per Seat) will be issued to existing equitable Seat holders and will represent 100% of the common equity ownership in the Phlx outstanding immediately after the demutualization. In addition, all Members and holders of equity trading permits ("ETPs") who are affiliated with Member Organizations and are not suspended will be entitled to receive

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

<sup>4</sup> See Letter from Edith Halihan, Deputy General Counsel, Phlx, to Nancy Sanow, Assistant Director, Division, Commission, 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.

<sup>5</sup> See Securities Exchange Act Release No. 48847 (November 26, 2003), 68 FR 67720 ("Notice").

<sup>6</sup> See Letter from Edith Halihan, Deputy General Counsel, Phlx, to Nancy Sanow, Assistant Director, Division, Commission, dated December 23, 2003 ("Amendment No. 3"). In Amendment No. 3 the Phlx formally submitted the Conversion Amendment as part of the proposed rule change.

<sup>7</sup> See Letter from Joseph Carapico, General Partner, Andrew W. Snyder, General Partner and Richard B. Feinberg, Limited Partner, Penn Mont Securities, to Jonathan G. Katz, Secretary, Commission, dated December 19, 2003 ("Penn Mont Letter").

<sup>8</sup> The Exchange, however, plans to retain its existing Foreign Currency Option ("FCO") participations (as defined in section 1-1(i) of the amended 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).

<sup>5</sup> 17 CFR 200.30-3(a)(12).

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

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