

subparagraph to Rule 2790(d), to be numbered Rule 2790(d)(2), which would provide that the prohibitions on the purchase and sale of new issues do not apply to securities that are specifically directed by the issuer to restricted persons, provided that a broker-dealer: (A) Does not underwrite any portion of the offering; (B) does not solicit or sell any new issue securities in the offering; and (C) has no involvement or influence, directly or indirectly, in the issuer's allocation decisions with respect to any of the new issue securities in the offering.

## II. Comments

The Commission received one comment on the proposal, which expressed support for the proposal, but requested clarification regarding two points under proposed NASD Rule 2790(d)(2).<sup>6</sup>

First, the commenter requested clarification that a new issue undertaken by an issuer may qualify for the exception provided for by proposed Rule 2790(d)(2), notwithstanding that the issuer has engaged a broker-dealer to provide advisory services, including advice regarding capital structure and capital raising, so long as no broker-dealer has engaged in the conduct specified in proposed Rule 2790(d)(2)(A)–(C) set forth above. The NASD noted in the Response Letter that nothing in proposed subparagraph (d)(2) would prevent an issuer from engaging a broker-dealer to provide such advisory services or other limited services, so long as the conditions set forth in the subparagraph continue to be satisfied.

Second, the commenter requested clarification that a purchaser may reasonably rely on a representation from an issuer to the effect that no broker-dealer has engaged in any of the conduct specified in proposed Rule 2790(d)(2)(A)–(C) with respect to the offering, so long as the purchaser neither knows, nor has reason to know, that the representation is false. In the Response Letter, the NASD stated that it believes that, for purposes of compliance with proposed Rule 2790(d)(2), a member or associated person that wishes to purchase new issues in such offerings may rely on a written representation obtained in good faith from the issuer that the conditions in proposed subparagraph (d)(2) are satisfied, so long as the member or associated person does not believe, or have reason to believe, that such representation is inaccurate.

<sup>6</sup> See *supra* note 4.

## III. Discussion

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association,<sup>7</sup> the requirements of Section 15A of the Act,<sup>8</sup> in general, and Section 15A(b)(6) of the Act,<sup>9</sup> in particular, which requires that the NASD's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission believes that the proposed rule change strikes a reasonable balance between providing issuers with flexibility in directing shares and improving the capital raising process while also preserving the objectives of NASD Rule 2790.

## IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change (SR–NASD–2006–074) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Nancy M. Morris,**

*Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–55877; File No. SR–Phlx–2006–87]

### Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Approving Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, Relating to Options Exchange Officials

June 7, 2007.

## I. Introduction

On December 14, 2006, the Philadelphia Stock Exchange, Inc. (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

<sup>7</sup> In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78o–3.

<sup>9</sup> 15 U.S.C. 78o–3(b)(6).

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> 17 CFR 200.30–3(a)(12).

(“Act”)<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> to eliminate floor officials from the Exchange and establish a new category of Exchange staff called Options Exchange Officials (“OEOs”). The Phlx filed Amendment No. 1 to the proposed rule change on February 23, 2007, and filed Amendment No. 2 to the proposed rule change on March 15, 2007. The proposed rule change, as amended, was published for comment in the **Federal Register** on April 6, 2007.<sup>3</sup> The Commission received no comments on the proposal. The Commission is approving the proposed rule change, as modified by Amendment Nos. 1 and 2.

## II. Description of the Proposed Rule Change

The Exchange proposes to create the new category of Exchange staff, OEOs, who will replace the Exchange's floor officials, and assume all authority and responsibility currently handled by the Exchange's floor officials. As a result, floor officials would cease to exist on the Exchange. Further, the Exchange's decision making process would be streamlined in that some rulings that currently require the concurrence of two floor officials, or two floor officials with the concurrence of a Market Surveillance officer, will now be made by one OEO. The role of the Exchange's Referee, however, will remain unchanged. The Exchange will make the proposed rule changes operative shortly after Commission approval of the proposal, and will notify members at least three business days in advance of such operative date.<sup>4</sup>

### Current Floor Official Process

Pursuant to Exchange By-Law Article VIII, floor officials are members who are designated by the Chairpersons of the Exchange's Options Committee and Foreign Currency Options Committee and are authorized to administer the provisions of Exchange By-Laws and Rules of the Exchange pertaining to the respective trading floors and the immediately adjacent premises of the Exchange. Among other things, floor officials may impose penalties, as applicable, for breaches of rules or regulations relating to order, decorum, health, safety and welfare on the respective trading floors. Additionally, floor officials may, in accordance with Exchange rules, rule on trading

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

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> See Securities Exchange Act Release No. 55552 (March 29, 2007), 72 FR 17212.

<sup>4</sup> Telephone conversation on May 7, 2007 between Richard Rudolph, Vice President and Counsel, Phlx and Jennifer Dodd, Special Counsel, Division of Market Regulation, Commission.

disputes, nullify or adjust the terms of executed trades, and grant relief to members and member organizations from certain Exchange requirements. The Exchange's Referee<sup>5</sup> currently may review floor official rulings concerning the nullification or adjustment of transactions in accordance with Exchange Rule 124(d), and may act in the capacity of a floor official respecting initial rulings concerning requests for relief from certain Exchange rules.<sup>6</sup> The granting of initial requests for relief, whether made by a floor official, or the Referee acting in the capacity of a floor official, are final rulings and may not be appealed.

#### OEOs

An OEO will be an Exchange staff member or contract employee designated as an OEO by the Exchange's Chief Regulatory Officer ("CRO"). A list of OEOs will be displayed on the Exchange's Web site, and will be maintained and updated by the Exchange's Referee.<sup>7</sup> The jurisdiction of the OEOs will be limited to Phlx's options trading floor and systems, and OEOs will be located on the Exchange's options trading floor and report to the CRO. The Exchange represents that OEOs will be members of the Exchange's regulatory staff, including the on-floor surveillance staff, who have sufficient expertise to act in the capacity of an OEO as determined by the CRO.

#### Duties of OEOs

Under the proposal, OEOs will be authorized to fulfill the duties currently performed by floor officials. In some instances, one OEO will be authorized to make decisions that currently require the concurrence of two floor officials, or two floor officials with the concurrence of a Market Surveillance officer. Among other things, OEOs will be authorized to rule on trading disputes occurring on the options trading floor, which could result in the adjustment or nullification of executed transactions, and to nullify or adjust executed transactions in the case of an obvious error.

OEOs also will be authorized to rule on initial requests for relief from the requirements of certain Exchange rules, such as rules relating to bid/ask differentials, disengagement of automatic execution systems, the determination that quotes in options on the Exchange or another market or

markets are subject to relief from the firm quote requirement, and trading halts, openings, and reopenings. An OEO will have the authority to direct the opening of a series at a price that falls outside of the Exchange's established parameters where necessary to ensure a fair and orderly market, and to rule on trading halts, rotations, and reopenings following a trading halt.

Further, pursuant to the proposal, an OEO will be authorized to impose on Exchange members, member organizations and participants, participant organizations, and their associated persons, fines for breaches of regulations that relate to administration of order, decorum, health, safety and welfare on the Exchange. An OEO also may exclude such persons and organizations from the trading floor for breaches of such regulations that occurred on the trading floor or premises immediately adjacent to the trading floor if any such person poses an immediate threat to the safety or persons or property or are seriously disrupting Exchange operations, or if any such person is in possession of a firearm.

#### Procedures for Review of OEO Rulings

The role of the Exchange's Referee will remain unchanged. The Referee may act in the capacity of an OEO respecting initial rulings concerning requests for relief pursuant to Phlx Rule 124, Commentary .02, such as relief from the Exchange's quote spread parameters. Such rulings currently are, and will continue to be, final and may not be appealed to the Exchange's Board of Directors. Also, floor official rulings that currently may be appealed to the Referee, such as adjustments or nullifications of executed transactions in the case of an obvious error, likewise may be appealed to the Referee when such rulings are made by an OEO pursuant to the proposal. A Referee will not be permitted to rule on an appeal from his or her own decision.<sup>8</sup>

#### III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>9</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,<sup>10</sup> which requires an

exchange to be so organized and have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange. The Commission also finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>11</sup> which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission believes that the Exchange's proposal to replace floor officials with Options Exchange Officials is designed to produce a more efficient process for the resolution of disputes on the Exchange and determinations currently made by floor officials. For example, the Commission believes that by reducing, in certain instances, the number of persons required to make Exchange rulings from two floor officials, or two floor officials with the concurrence of a Market Surveillance officer, to one OEO, the proposal is designed to expedite the Exchange's decision making process. In addition, by requiring an OEO to be Exchange staff or a contract employee, the Commission believes that the proposed rule change is designed to minimize the potential conflicts of interest that may arise when a member of the Exchange is called upon to act in the capacity of a floor official and to make a decision on a matter involving one or more other members.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change (SR-Phlx-2006-87), as modified by Amendment Nos. 1 and 2, be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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<sup>5</sup> The Exchange's "Referee" is an employee of the Exchange, or an independent contractor, who is approved by the Board of Governors on the recommendation of the Audit Committee. See Phlx Rule 124, Commentary .02.

<sup>6</sup> See *id.*

<sup>7</sup> See proposed Phlx Rule 1(pp).

<sup>8</sup> See proposed Phlx Rule 124, Commentary .01.

<sup>9</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>10</sup> 15 U.S.C. 78f(b)(1).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

<sup>12</sup> 15 U.S.C. 78s(b)(2).

<sup>13</sup> 17 CFR 200.30-3(a)(12).