

By the Commission.

Jill M. Peterson,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50573; File No. SR-NASD-2004-105]

Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. To Amend Rule 4350(n) and IM-4350-7 To Provide Time Frames for Foreign Issuers and Foreign Private Issuers To Disclose Certain Code of Conduct Waivers

October 20, 2004.

On July 8, 2004, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend NASD Rule 4350 and related Interpretive Material to set forth specific time frames within which non-U.S. issuers must disclose any waivers of their codes of conduct for directors or executive officers. On August 23, 2004, Nasdaq filed Amendment No. 1 to the proposed rule change.³ The proposed rule change, as amended, was published for comment in the **Federal Register** on September 1, 2004.⁴ The Commission received no comments on the proposal.

NASD Rule 4350(n) and Interpretive Material IM-4350-7 require issuers listed on Nasdaq to adopt codes of conduct that are applicable to all directors, officers and employees. Each code of conduct must require that any waiver of the code for executive officers or directors may be made only by the board of directors of the issuer and must be promptly disclosed to shareholders, along with the reasons for the waiver. The rule specifies that domestic issuers must disclose such waivers in a Form 8-K within five business days. The proposed rule change would amend the

rule and interpretive material to specify that all issuers, other than foreign private issuers, must disclose such waivers in a Form 8-K within five business days, and to establish that foreign private issuers must disclose such waivers either in a Form 6-K or in the next Form 20-F or 40-F.

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association,⁵ and, in particular, the requirements of section 15A(b)(6) of the Act.⁶ The Commission believes that the proposed method and timing for disclosure of waivers by foreign private issuers is consistent with rules of other exchanges concerning such waivers and with the requirements of the Commission concerning disclosure of waivers by a foreign private issuer for principal executive, financial and accounting officers. In addition, the Commission believes that the proposed rule change appropriately clarifies that non-U.S. issuers that are not foreign private issuers must meet the same disclosure requirements as domestic issuers.

It is therefore ordered, pursuant to section 19(b)(2) of the Act⁷, that the proposed rule change, as amended, (File No. SR-NASD-2004-105) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁸

Jill M. Peterson,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50563; File No. SR-Phlx-2004-64]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to the Change in Weighting Methodology of the Phlx/KBW Bank Index

October 19, 2004.

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 October 15, 2004, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in items I and II below, which Items have been prepared by the Exchange. The Exchange has filed the proposal as a "non-controversial" rule change pursuant to section 19(b)(3)(A) of the Act,³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal effective upon filing with the Commission.⁵ The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Phlx proposes to change the weighting methodology of the Phlx/KBW Bank Index (the "Bank Index" or "Index"), an index developed by Keefe, Bruyette & Woods, Inc. ("KBW"), a registered broker-dealer that specialized in U.S. bank stocks, from capitalization-weighted to modified capitalization weighted. No other changes are being made to the Index. The Exchange seeks continued approval to list and trade options on the Index after it has instituted this change.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The Exchange 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

According to the Phlx, the purpose of the proposal is to change the weighting methodology of the Index from

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Mary M. Dunbar, Vice President and General Counsel, Nasdaq, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated August 20, 2004 ("Amendment No. 1").

⁴ See Securities Exchange Act Release No. 50267 (August 26, 2004), 69 FR 53478 (September 1, 2004).

⁵ 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).

⁶ 15 U.S.C. 78o-3(b)(6).

⁷ 15 U.S.C. 78s(b)(2).

⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ The Phlx provided the five day-pre-filing requirement but requested that the Commission waive the 30-day operative delay. See Rule 19b-4(f)(6)(iii). 17 CFR 240.19b-4(f)(6)(iii).

capitalization weighted to modified capitalization-weighted, which change has been requested by the Index's sponsor, KBW.⁶ The Index is currently a capitalization-weighted index composed of 24 geographically diverse stocks select representing national money center banks and leading regional institutions. The Exchange currently lists and trades European-style, cash-settled options on the Index. The Exchange has been informed that KBW plans, as of Friday, October 15, 2004 (after the close of trading), to begin calculating the Index under a "modified capitalization-weighted" methodology. The Exchange commits that all of the terms of the Commission's 1992 approval order for this product remain in place, including but not limited to the description of the composition of the Index, maintenance of the Index and maintenance standards for continued listing of Index options, calculation of the Index, contract specifications, and the Exchange's obligation to provide surveillance of the trading of Index options and KBW's trading activity in the options and related instruments (*i.e.*, stocks included in or deleted from the Index and options on such stocks); only the weighting methodology is being modified.⁷ The Index was originally listed in 1992 as a narrow-based (industry) index.⁸

The Index was developed by KBW, a New York investment banking firm, which maintains the Index pursuant to an agreement with the Exchange. The Index is evaluated at least annually by KBW to assure that the composition is highly representative of the banking industry. Options on the Index ("BKX

Options") commenced trading on the Phlx on September 21, 1992.⁹

The Exchange intends to institute this proposed change of weighting methodology for options listed and traded as of October 19, 2004, the Tuesday following October expiration.¹⁰ Prior to October 19, 2004, the Exchange will begin calculating a new Index employing the modified capitalization weighting (the "Reconstituted Index").¹¹ The Reconstituted Index will then be effective for all series of BKX Options outstanding at the open of the market on October 20, 2004. There will be no "side-by-side" trading of option series on the old Index and the Reconstituted Index.¹² KBW has stated that the new, modified capitalization weighting methodology is expected to: (1) Retain in general the economic attributes of capitalization weighting; (2) promote portfolio weight diversification (thereby limiting domination of the Index by a few large stocks); (3) reduce Index performance distortion by preserving the capitalization ranking of component companies; and (4) reduce market impact on the smallest component securities from necessary weight rebalancings.

Under the new, modified capitalization weighting methodology, the four largest component stocks,¹³ will be assigned maximum initial weights equal to the lesser of their actual capitalization weight or 10% in the Reconstituted Index. All other component stocks with a capitalization weight of more than 4.5% will be assigned initial weights of 4.5% in the Reconstituted Index. All component stocks with capitalization weights under 4.5% will share equally in the weight available for redistribution, but none of these banks will be assigned an initial weight of more than 4.5%.

Based on capitalizations of component securities as of the close on the Monday before the third Saturday of

the last month in each calendar quarter, the Index will be rebalanced¹⁴ according to the following rules:

1. If any of the top four banks' index weightings have increased beyond 12.5%, their weighting will be reduced to a maximum of 10% in the quarterly rebalancing.
2. If any of the remaining banks' weightings have increased beyond 5%, their weightings will be reduced to a maximum of 4.5% in the rebalancing.
3. If any of the top four banks' weightings have dropped below 8%, their weightings will be increased to the lesser of their actual capitalization weight or 10% in the rebalancing.
4. If any of the banks with unadjusted capitalization weights greater than 5% have declined in index weighting below 4%, their weightings will be increased to 4.5% in the rebalancing.
5. Any excess weighting available will be reallocated to the smaller banks and any weighting needed to increase weighting in the larger banks will be taken from the smaller banks in the same manner as in the initial allocation at the time of the rebalancing.

The Exchange notified market participants of the decision to modify the weighting methodology of the Index through a notice to members and member organizations in advance of Friday, October 15, 2004.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirement under section 6(b)(5) of the Act¹⁵ in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest by modifying the weighting methodology of the Index from a capitalization-weighted index to a modified capitalization-weighted index that will contribute to the maintenance of fair and orderly markets consistent with investor protection, ensuring that no one component stock or group of component stocks dominate the Index. Moreover, the Exchange believes that the proposal will have the effect of increasing the potential influence of smaller component stocks on the movement of the Index.

¹⁴ The rebalancing will be implemented at the close on the Friday before the third Saturday of the last month in each calendar quarter.

¹⁵ 15 U.S.C. 78f(b)(5).

⁶ Because the Index is maintained by Keefe, Bruyette & Woods, a broker-dealer, Keefe, Bruyette & Woods has represented to Phlx that it has appropriate information barriers around the personnel who have access to information concerning changes and adjustments to the Index, and the Index is calculated by an independent, third-party who is not a broker-dealer. Telephone conference between Mark Salvacion, Director and Counsel, Phlx, and Florence Harmon, Senior Special Counsel, Division, Commission on October 19, 2004.

⁷ Telephone conference between Mark Salvacion, Director and Counsel, Phlx, and Florence Harmon, Senior Special Counsel, Division, Commission on October 19, 2004.

⁸ See Securities Exchange Act Release No. 31145 (September 3, 1992), 57 FR 41531 (September 10, 1992) (File No. SR-Phlx-91-27) ("Approval Order"). Even though the BKX was listed prior to the development of generic listing standards for industry (narrow-based) options in Phlx 1009A, it will be maintained in compliance with such standards, along with criteria set out in the 1992 Approval Order. Telephone conference between Mark Salvacion, Director and Counsel, Phlx, and Florence Harmon, Senior Special Counsel, Division, Commission on October 19, 2004.

⁹ *Id.*

¹⁰ Telephone conference between Mark Salvacion, Director and Counsel, Phlx, and Florence Harmon, Senior Special Counsel, Division, Commission on October 19, 2004 (adjusted date of weighting change).

¹¹ Prior notice of the composition, weighting, and divisor of the Reconstituted Index is necessary so that specialists and other member organizations may rebalance or adjust their hedge positions in accordance with the new weighting methodology.

¹² The divisor of the Reconstituted Index will be adjusted in order to ensure that there is economic equivalence between the old Index and the Reconstituted Index. Therefore, upon the launch of the Reconstituted Index, there will be no change in the index value between the old Index and the Reconstituted Index and, consequently, strike prices for all open interest will not need to be adjusted.

¹³ Currently, these are Citigroup, Bank of America, J.P. Morgan-Chase and Wells Fargo.

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

The Phlx does not believe that the proposed rule change will 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

No written comments were either solicited or received.

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

Because the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days (or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest) after the date of the filing, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act¹⁶ and Rule 19b-4(f)(6) thereunder.¹⁷ At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

A proposed rule change filed under Rule 19b-4(f)(6) normally must not become operative prior to 30 days after the date of the filing. In addition, a self-regulatory organization filing a proposed rule change under Rule 19b-4(f)(6)(iii) normally must give the Commission written notice of its intent to file the proposed rule change five days prior to the date of filing. However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange provided the five-day pre-filing requirement, but the Exchange has requested that the Commission waive the 30-day operative delay and allow the proposed rule change become operative immediately to promote portfolio weight diversification, reduce Index performance distortion, reduce market impact on the smallest component securities from necessary weight rebalancings, and in general, retain the economic attributes of capitalization weighting.

The Commission believes it is consistent with the protection of investors and the public interest to designate the proposal immediately operative.¹⁸ Accelerating the operative date should permit the Exchange to conform its methodology of the Index to that employed by the sponsor of the Index, KBW. Furthermore, the Commission believes that the proposed change in weighting methodology does not present any new novel regulatory issues, and is similar to proposed rule changes that were approved previously by the Commission.¹⁹ The Commission also finds determinative that the weighting methodology reduces the weighting concentration of components of the Index in a manner similar to that of Phlx Rule 1009A. Accordingly, the Commission designates the proposed rule change to be operative upon filing with the Commission.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2004-64 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-Phlx-2004-64. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule

¹⁸ For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁹ See Securities Exchange Act Release No. 40642 (November 5, 1998), 63 FR 63759 (November 16, 1998) (SR-CBOE-98-43).

change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2004-64 and should be submitted on or before November 16, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁰

Jill M. Peterson,

Assistant Secretary.

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SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3629]

State of Georgia (Amendment #2)

In accordance with notices received from the Department of Homeland Security—Federal Emergency Management Agency—effective September 24 and 29, and October 14, 2004, the above numbered declaration is hereby amended to include Clayton and Forsyth Counties as disaster areas due to damages caused by Hurricane Ivan occurring on September 14, 2004, and continuing.

In addition, applications for economic injury loans from small businesses located in the contiguous county of Spalding in the State of Georgia may be filed until the specified date at the previously designated location. All other counties contiguous to the above named primary counties have previously been declared.

In addition, Banks, Carroll, Cherokee, Dade, Dawson, DeKalb, Early, Elbert, Fannin, Forsyth, Franklin, Fulton, Gilmer, Habersham, Harris, Heard, Lumpkin, Madison, Miller, Pickens, Pike, Rabun, Towns, Union, Upson, White, and Wilkes Counties in the State of Georgia are also eligible under Public Assistance and our disaster loan

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f)(6).

²⁰ 17 CFR 200.30-3(a)(12).