

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.