

Edgar Filing: FLUSHING FINANCIAL CORP - Form S-8

FLUSHING FINANCIAL CORP  
Form S-8  
May 31, 2005

Registration No. \_\_\_\_\_

As filed with the Securities and Exchange Commission on May 31, 2005

-----  
UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549  
-----

FORM S-8

Registration Statement

Under

The Securities Act of 1933

FLUSHING FINANCIAL CORPORATION

-----  
(Exact name of registrant as specified in its charter)

DELAWARE

11-3209278

-----  
(State or other jurisdiction of  
incorporation or organization)

-----  
(IRS Employer  
Identification No.)

1979 MARCUS AVENUE, SUITE E140,  
LAKE SUCCESS, NY

11042

-----  
(Address of Principal Executive Offices)

-----  
(Zip Code)

2005 OMNIBUS INCENTIVE PLAN

-----  
(Full title of the plans)

John R. Buran  
Flushing Financial Corporation,  
1979 Marcus Avenue, Suite E140, Lake Success, NY 11042  
(718) 961-5400

-----  
(Name, address and telephone number of agent for service)

Copy to: Gloria W. Nusbacher, Esq.  
Hughes Hubbard & Reed LLP  
One Battery Park Plaza  
New York, N.Y. 10004

CALCULATION OF REGISTRATION FEE

| Title of Securities to be Registered | Amount to be Registered (2) (3) | Proposed Maximum Offering Price Per Share (2) (3) | Proposed Maximum Aggregate Offering Price (2) (3) | Am Regi Fee |
|--------------------------------------|---------------------------------|---|---|-------------|
| -----                                | -----                           | -----   | -----   | -----       |

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|   |                  |         |         |    |
|---|------------------|---------|---------|----|
| Common Stock,<br>par value<br>\$.01 per share (1) | 1,183,193 shares | \$16.95 | \$16.95 | \$ |
|---|------------------|---------|---------|----|

(see footnotes on follo

FOOTNOTES

- (1) Each share of Common Stock issued prior to September 30, 2006 includes a related right (a "Right") to purchase junior participating preferred stock of the Company. The Rights are not exercisable or transferable apart from the Common Stock at this time, and accordingly no independent value is attributable to such Rights.
- (2) Includes one share for which the associated registration fee is being paid herewith, plus 1,183,192 shares previously registered on Form S-8 for delivery under the Company's 1996 Stock Option Incentive Plan and/or 1996 Restricted Stock Incentive Plan which are available for grant as of the date hereof and which, pursuant to contemporaneously filed post-effective amendments to such prior registration statements are being transferred to this registration statement, together with the associated registration fee, for delivery under the Company's 2005 Omnibus Incentive Plan, as follows: (i) 111,698 shares transferred from No. 333-85639 filed on August 20, 1999; (ii) 202,500 shares transferred from No. 333-89450 filed on May 31, 2002; and (iii) 868,994 shares transferred from No. 333-110454 filed on November 13, 2003.
- Also includes up to a maximum of 2,062,383 shares previously registered on Form S-8 which are subject to outstanding awards under the Company's 1996 Stock Option Incentive Plan and/or 1996 Restricted Stock Incentive Plan, to the extent such shares become available for grant under the Company's 2005 Omnibus Incentive Plan as a result of forfeitures of awards or application of shares to satisfy tax withholding obligations. Pursuant to contemporaneously filed post-effective amendments to such prior registration statements, such shares shall be deemed transferred to this registration statement, together with the associated registration fee, when and to the extent such shares become available for future grants under the Company's 2005 Omnibus Incentive Plan. Such shares will be transferred from the prior registration statements as follows: (i) up to 404,951 shares from No. 333-3878 filed on April 22, 1996; (ii) up to 816,427 shares from No. 333-85639 filed on August 20, 1999; (iii) up to 810,000 shares from No. 333-89450 filed on May 31, 2002; and (iv) up to 31,006 shares from No. 333-110454 filed on November 13, 2003.
- (3) This Registration Statement also relates to such indeterminate number of additional shares (and related Rights) as may be issuable pursuant to stock splits, stock dividends, or similar transactions.
- (4) The proposed maximum offering price per share for the one new share being registered is calculated solely for purposes of Rule 457(h) under the Securities Act of 1933 and is based on a price of \$16.95, which is the average of the high and low sales prices of the Common Stock on May 23, 2005 as quoted on the Nasdaq National Market.

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### INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

#### Item 3. INCORPORATION OF DOCUMENTS BY REFERENCE

The following documents filed by Flushing Financial Corporation (the "Company") under the Securities Exchange Act of 1934 (the "Exchange Act") are incorporated herein by reference:

(a) The Company's Annual Report on Form 10-K for the year ended December 31, 2004;

(b) All other reports filed by the Company pursuant to Section 13(a) or 15(d) of the Exchange Act since December 31, 2004; and

(c) The description of the Company's Common Stock and Rights contained in the Company's registration statements therefor and subsequent amendments thereof.

All documents filed by the Company pursuant to Sections 13(a), 13(c), 14 and 15(d) of the Exchange Act after the date of this Registration Statement and prior to the filing of a post-effective amendment which indicates that all securities offered hereby have been sold or which deregisters all securities then remaining unsold, shall be deemed to be incorporated by reference in this Registration Statement and to be a part hereof from the date of the filing of such documents.

Any statement contained in a document incorporated by reference herein shall be deemed to be modified or superseded for purposes of this Registration Statement to the extent that a statement contained in a subsequently filed document which is also incorporated by reference herein modifies or supersedes such statement.

#### Item 4. DESCRIPTION OF SECURITIES

Not applicable.

#### Item 5. INTERESTS OF NAMED EXPERTS AND COUNSEL

Not applicable.

#### Item 6. INDEMNIFICATION OF DIRECTORS AND OFFICERS

Section 145 of the General Corporation Law of the State of Delaware (the "DGCL") empowers a Delaware corporation to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding (other than an action by or in the right of the corporation) by reason of the fact that such person is or was a director, officer, employee, or agent of the corporation or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation or other enterprise, against expenses (including attorneys' fees),

judgments, fines and amounts paid in settlement actually and reasonably incurred by such person in connection with such action, suit or proceeding if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the corporation and, with respect to any criminal action or proceeding, had no reasonable cause to believe such person's conduct was unlawful.

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A similar standard of care is applicable in the case of derivative actions to which such a person is or was a party by reason of such person's status or capacity as described above, except that indemnification only extends to expenses (including attorneys' fees) actually and reasonably incurred by such person in connection with the defense or settlement of such an action, and the DGCL requires court approval before there can be any indemnification where the person seeking indemnification has been found liable to the corporation. Additionally, the corporation is required to indemnify its directors and officers against expenses (including attorneys' fees) actually and reasonably incurred by such person to the extent that such directors or officers have been successful on the merits or otherwise in defense of any claim, issue or matter referred to in Section 145 of the DGCL.

Section 145 of the DGCL also authorizes a corporation to pay the expenses (including attorneys' fees) incurred by an officer or director in defending any such proceedings in advance of their final disposition. Such advance payment of expenses, however, may be made only upon delivery to the corporation by the indemnified party of an undertaking to repay all amounts so advanced if it shall ultimately be determined that the person receiving such payments is not entitled to be indemnified pursuant to Section 145 of the DGCL. The DGCL also provides that its provisions regarding indemnification and advancement of expenses are not exclusive of other rights which may be provided by bylaw, agreement, or otherwise.

In addition, Section 145 of the DGCL authorizes a Delaware corporation to purchase and maintain insurance, at its expense, on behalf of any person who is or was a director, officer, employee or agent of the corporation or is or was serving at the corporation's request in such capacity for another entity against any liability asserted against, or incurred by, such person in any such capacity or arising out of such status, whether or not the corporation would have the power to indemnify such person against such liability under Section 145 of the DGCL.

The Company's Certificate of Incorporation limits under certain circumstances the personal liability of the Company's directors for a breach of their fiduciary duty as directors. The provisions do not eliminate the liability of a director (i) for a breach of the director's duty of loyalty to the Company or its shareholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the DGCL (relating to the declaration of dividends and purchase or redemption of shares in violation of the DGCL), or (iv) for any transaction from which the director derived an improper personal benefit.

Article TENTH of the Company's Certificate of Incorporation provides that the Company shall indemnify to the fullest extent permitted by the laws of the State of Delaware any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding by reason of the fact that such person is or was a director or officer of the

Company. Article TENTH further provides that such persons have the right to be paid in advance by the Company for their expenses to the full extent permitted by the laws of the State of Delaware.

Flushing Savings Bank, FSB (the "Bank"), which is a wholly-owned subsidiary of the Company, has the following provisions for the indemnification of directors and officers:

Article XI of the Bank's Bylaws provides that, to the full extent permitted by law, the Bank shall indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending or completed

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action, suit or proceeding by reason of the fact that such person is or was a director or officer of the Bank. Article XI further provides that, to the full extent permitted by law, the Bank shall advance or promptly reimburse upon request any person entitled to indemnification thereunder for the reasonable expenses, including attorneys' fees and expenses, reasonably incurred in connection with any proceeding in advance of the final disposition thereof in accordance with such procedures as the Board of Directors shall determine in accordance with applicable law.

In addition, Article XI provides that upon resolution passed by the Board of Directors, the Bank may purchase and maintain insurance to indemnify directors and officers and others, whether or not entitled to indemnification under Article XI of the Bylaws to the full extent permitted by law.

Regulations promulgated by the FDIC at 12 CFR 359 provide that an insured depository institution (such as the Bank) or affiliated depository institution holding company (such as the Company) may make or agree to make reasonable indemnification payments to certain persons, including officers and directors of the institution and its holding company, with respect to an administrative proceeding or civil action initiated by any federal banking agency, only if: (i) the indemnification payments do not pay or reimburse such person for a civil money penalty or judgment resulting from any administrative or civil action instituted by any federal banking agency, or for any other expense (including the amount of any settlement) which results in a final order or settlement pursuant to which such person is assessed a civil money penalty, is removed from office or prohibited from participating in the conduct of the affairs of the insured depository institution, or is required to cease and desist from or take specified affirmative actions with respect to such institution; and (ii) the board of directors of the insured depository institution or depository institution holding company, in good faith, determines in writing after due investigation and consideration (A) that the person acted in good faith and in a manner he/she believed to be in the best interests of the institution, and (B) that the payment of such expenses will not materially adversely affect the institution's or holding company's safety and soundness. The Regulations allow the insured depository institution or depository institution holding company to advance expenses only if the recipient undertakes to reimburse the institution or holding company to the extent the above standards for permissible indemnification are not satisfied.

The Company and the Bank have entered into an Indemnity Agreement with each of their executive officers and directors, which agreements provide for mandatory indemnification for each such person to the full extent permitted by law against judgments, fines, amounts paid in settlement, and expenses incurred in connection with any claim arising out of such person's service to

the Company or the Bank unless he was adjudicated to have acted in bad faith, deliberate dishonesty or for personal gain. The agreements provide for advancement of expenses and specify procedures for determining entitlement to indemnification in a particular case.

The Bank has a contract for insurance coverage under which the Bank's officers and directors (as well as the Company) are indemnified under certain circumstances with respect to litigation and other costs and liabilities arising out of actual or alleged misconduct of such directors and officers.

Item 7. EXEMPTION FROM REGISTRATION CLAIMED

Not applicable.

Item 8. EXHIBITS

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See Exhibit Index attached hereto.

### Item 9. UNDERTAKINGS

(a) The Company hereby undertakes:

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this Registration Statement:

(i) To include any prospectus required by Section 10(a)(3) of the Securities Act of 1933;

(ii) To reflect in the prospectus any facts or events arising after the effective date of the Registration Statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represents a fundamental change in the information set forth in the Registration Statement;

(iii) To include any material information with respect to the plan of distribution not previously disclosed in the Registration Statement or any material change to such information in the Registration Statement.

Provided, however, that paragraphs (a)(1)(i) and (a)(1)(ii) do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in periodic reports filed by the Company pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the Registration Statement.

(2) That, for the purpose of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

(b) The Company hereby undertakes that, for purposes of determining any liability under the Securities Act of 1933, each filing of the Company's annual report pursuant to Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934 (and, where applicable, each filing of an employee benefit plan's annual report pursuant to Section 15(d) of the Securities Exchange Act of 1934) that is incorporated by reference in the Registration Statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(c) Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the Company pursuant to the foregoing provisions, or otherwise, the Company has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in such Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the Company of expenses incurred or paid by a director, officer or controlling person of the Company in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the

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securities being registered, the Company will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in such Act and will be governed by the final adjudication of such issue.

SIGNATURES

THE REGISTRANT. Pursuant to the requirements of the Securities Act of 1933, the Registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the County of Nassau, State of New York, on this 27th day of May, 2005.

FLUSHING FINANCIAL CORPORATION

By: /S/ JOHN R. BURAN

-----  
John R. Buran  
Executive Vice President and  
Chief Operating Officer

Pursuant to the requirements of the Securities Act of 1933, this Registration Statement has been signed below by the following persons in the capacities indicated on this 27th day of May, 2005.

SIGNATURE

CAPACITY

\*  
-----  
Michael J. Hegarty  
President and Chief Executive Officer  
and Director  
(Principal Executive Officer)

\*  
-----  
Gerard P. Tully, Sr.  
Director and Chairman

\*  
-----  
John R. Buran  
Executive Vice President and Chief  
Operating Officer and Director

\*  
-----  
David W. Fry  
Senior Vice President, Chief  
Financial Officer and Treasurer  
(Principal Financial and  
Accounting Officer)

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SIGNATURE

CAPACITY

\*

Director

-----  
James D. Bennett

\*

Director

-----  
Steven J. D'Iorio

\*

Director

-----  
Louis C. Grassi

\*

Director

-----  
John J. McCabe

\*

Director

-----  
Vincent F. Nicolosi

\*

Director

-----  
Donna M. O'Brien

\*

Director

-----  
Franklin F. Regan, Jr.

\*

Director

-----  
John E. Roe, Sr.

Director

-----  
Michael J. Russo

\* By: /S/ JOHN R. BURAN  
-----,  
as authorized by Power of  
Attorney filed as Exhibit



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24.1 to this Registration  
Statement

### EXHIBIT INDEX

| NUMBER<br>----- | DESCRIPTION<br>-----   | METHOD OF FILING<br>-----  |
|-----------------|--|--|
| 4.1             | Certificate of Incorporation of the Company  | Filed as Exhibit 3.1 to Registration Statement on Form S-1 (No. 33-96488)  |
| 4.2             | Amendment to Certificate of Incorporation  | Filed as Exhibit 4.2 to Registration Statement on Form S-8 (No. 333-89450) filed on May 31, 2002                       |
| 4.3             | Certificate of Designations of Series A Junior Participating Preferred Stock of the Company  | Filed as Exhibit 3.3 to Form 10-Q for the quarter ended September 30, 2002   |
| 4.4             | By-Laws of the Company   | Filed as Exhibit 3.2 to Registration Statement on Form S-1 (No. 33-96488)  |
| 4.5             | Rights Agreement dated as of September 17, 1996 between the Company and EquiServe Trust Company N.A. (successor to State Street Bank and Trust Company), as Rights Agent | Filed as an Exhibit to the Company's Report on Form 8-K filed September 30, 1996                                       |
| 4.6             | 2005 Omnibus Incentive Plan  | Filed as Appendix A to the Company's Proxy Statement for its 2005 Annual Meeting of Stockholders, filed March 31, 2005 |
| 5.1             | Opinion of Hughes Hubbard & Reed LLP   | Filed herewith   |
| 23.1            | Consent of Independent Registered Public Accounting Firm   | Filed herewith   |
| 23.2            | Consent of Hughes Hubbard & Reed LLP   | Contained in Exhibit 5.1   |
| 24.1            | Powers of Attorney   | Filed herewith   |