

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49277; File No. SR-Phlx-2004-04]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 by the Philadelphia Stock Exchange, Inc. To Reduce the Minimum Order Size Required To Use One of the Phlx's Procedures for Crossing Transactions

February 19, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4² thereunder, notice is hereby given that on January 12, 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, II, and III, below, which Items have been prepared by the Exchange. On February 11, 2004, the Phlx amended the proposed rule change.³ The Phlx filed the proposal pursuant to Section 19(b)(3)(A) of the Act,⁴ and Rule 19b-4(f)(6) thereunder,⁵ which renders the proposal effective upon filing with the Commission.⁶ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Phlx proposes to amend Phlx Rule 126, "Crossing" Orders, Supplementary Material (h). Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

Rule 126, "Crossing" Orders

Rule 126. When a member has an order to buy and an order to sell the

same security, he must offer such security at a price which is higher than his bid by the minimum variation permitted in such security before making a transaction with himself.

Supplementary Material:

(a)-(g) No Change.

(h) If prior to presenting a cross transaction involving [10,000] 5,000 shares or more, a member requests that the specialist post the current market for the security ("Updated Quotation"), the member may execute a cross transaction:

(i) at the Updated Quotation, if both sides of the cross transaction are agency orders and the Updated Quotation contains no agency orders; or

(ii) between the Updated Quotation, without interference by another member. In no event shall an agency order on the book having time priority, remain unexecuted after any other order at its price has been effected pursuant to this rule or otherwise.

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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 Phlx 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 Phlx 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

On February 29, 2003, the Commission approved an amendment to Phlx Rule 126 which added Supplementary Material (h), instituting an alternative procedure for crossing certain orders of 10,000 shares or greater (the "Alternative Procedure").⁷ The Alternative Procedure allows a member with an order to buy and an order to sell the identical number of shares of the same security to cross those orders without interference by another member under certain circumstances.⁸

⁷ See Securities Exchange Act Release No. 47373 (February 19, 2003), 68 FR 8790 (February 25, 2003) (SR-Phlx-2002-76) (approval order).

⁸ "Crossed orders" or "crosses" are two orders, one to buy and one to sell the identical number of shares of the same security, which a member is brokering for his or her customers. Supplementary

Currently, in order to use the Alternative Procedure, the member attempting to cross without interference by another member must satisfy a number of preconditions. First, the potential cross must involve orders of greater than 10,000 shares. Second, prior to introducing the cross, the member attempting to cross must ask the specialist in the security to post the current market for the security (the "Updated Quotation"). Upon receiving the Updated Quotation, the member may execute the cross transaction without interference by another member either (1) at the Updated Quotation, if both sides of the cross transaction are agency orders⁹ and the Updated Quotation contains no agency orders, or (2) between the Updated Quotation in any other case.¹⁰ If either side of the cross would take place outside the Updated Quotation, or at the Updated Quotation for crosses where one or both sides of the cross transaction are non-agency orders or the Updated Quotation contains an agency order, the member may not cross using the Alternative Procedure.¹¹

The Exchange now proposes to reduce the minimum order size required to use

Material (h) to Phlx Rule 126 does not preclude Exchange members from choosing to cross such orders under another provision of Phlx Rule 126. If a member wishes to effect a crossing transaction other than pursuant to the Alternative Procedure, another member may participate, or "break up," the transaction, by offering (after the presentation of the proposed crossing transaction) to improve one side of the transaction by the minimum price variation. The member presenting the cross is then effectively prevented from consummating the transaction as a "clean cross" which may be to the detriment of the member's customer. The Exchange notes that the minimum price variation is one penny, making it relatively inexpensive for another Exchange member to break up the crossing transaction by simply improving one side or the other by one penny. The Alternative Procedure recognizes that some institutional customers prefer executing large crossing transactions at a single price and are willing to forego the opportunity to achieve the piecemeal price improvement that might result from the break up of the cross transaction by another Exchange member.

⁹ As the Exchange noted in SR-Phlx-2002-76, agency orders are orders that are not for the account of brokers or dealers. See *infra* note 7.

¹⁰ The Exchange noted in SR-Phlx-2002-76 that, as with all other trading on the Exchange, members must adhere to the trading restrictions contained in Section 11(a) of the Act, 15 U.S.C. 78k(a), and SEC Rules 11a-1 *et. seq.*, 17 CFR 240.11a-1 *et. seq.*, pertaining to members trading on the Exchange floor for their own account. See *infra* note 7.

¹¹ The unavailability of the Alternative Procedure does not restrict how a member may then continue to represent the orders that otherwise would have been crossed. For instance, a member may choose to execute part of one of the sides of the cross against the trading interest that caused the unavailability of the Alternative Procedure and then attempt to execute the remaining portion of the cross using the Alternative Procedure. A member could also decide to seek execution for the cross in another market.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Carla Behnfeldt, Director, New Product Development Group, Legal Department, Phlx, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated February 10, 2004 ("Amendment No. 1"). In Amendment No. 1, the Phlx changed all references to Chicago Stock Exchange ("CHX") Rule 23 to CHX Article XX, Rule 23, Interpretations and Policies Section .01. See also, *infra* notes 12 and 13. For purposes of calculating the 60-day abrogation period, the Commission considers the period to have commenced on February 11, 2004, the date the Exchange filed Amendment No. 1.

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ 17 CFR 240.19b-4(f)(6).

⁶ The Phlx provided the Commission with notice of its intent to file the proposed rule change on December 29, 2003. See Rule 19b-4(f)(6)(iii). 17 CFR 240.19b-4(f)(6)(iii).

the Alternative Procedure from 10,000 shares to 5,000 shares. The Exchange believes that the reduction in the minimum share size will permit added flexibility to Phlx market participants in that it will allow use of the Alternative Procedure in a greater number of circumstances.

In proposing the Alternative Procedure, the Exchange based the proposed rule change on CHX Article XX, Rule 23, Interpretations and Policies Section .01¹² and American Stock Exchange ("Amex") Rule 126(g) Commentary .02. The Alternative Procedure is similar to CHX Article XX, Rule 23, Interpretations and Policies Section .01 in that it allows members to cross without¹³ interference from another member following a request for an Updated Quotation.¹⁴ The Exchange also noted that the Alternative Procedure is similar to Amex Rule 126(g) Commentary .02 in that the Alternative Procedure allows members to cross at the Updated Quotation when both sides of the cross transaction are agency orders and the Updated Quotation contains no agency orders.

Both CHX Article XX, Rule 23 Interpretations and Policies Section .01 and Amex Rule 126(g) Commentary .02 require a minimum share size of only 5,000 shares (as opposed to the 10,000 share minimum currently required under the Phlx Alternative Procedure). The instant proposed rule change will bring the Phlx minimum size in line

with the minimum size required under CHX Article XX, Rule 23 Interpretations and Policies Section .01 and Amex Rule 126(g) Commentary .02.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act¹⁵ in general, and furthers the objectives of Section 6(b)(5) of the Act¹⁶ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and to perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. Specifically, the proposal will make the choice to use the Alternative Procedure available to market participants in a wider range of circumstances than is currently permitted.

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

The Exchange 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 solicited or received.

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

Because the foregoing proposed rule change does not:

- (i) Significantly affect the protection of investors or the public interest;
- (ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁷ and Rule 19b-4(f)(6) thereunder.¹⁸ 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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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. All comment letters should refer to File No. SR-Phlx-2004-04. 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, comments should be sent in hard copy 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 Phlx. All submissions should refer to File No. SR-Phlx-2004-04 and should be submitted by March 17, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Margaret H. McFarland,
Deputy Secretary.

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SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #P020]

State Of South Carolina

As a result of the President's major disaster declaration for Public Assistance on February 13, 2004, the U.S. Small Business Administration is activating its disaster loan program only for private non-profit organizations that provide essential services of a governmental nature. I find that Aiken, Bamberg, Barnwell, Calhoun, Clarendon, Edgefield, Florence, Horry, Kershaw, Lexington, Marion,

¹² When the Exchange originally proposed the Alternative Procedure, the Exchange incorrectly stated that the proposed rule change was based on "Chicago Stock Exchange ("CHX") Rule 23 and American Stock Exchange ("Amex") Rule 126(g) Commentary .02" when the Exchange should have stated that the proposed rule change was based on CHX Article XX Rule 23 and Amex Rule 126(g) Commentary .02. The incorrect text is in the unpublished portion of the Exchange's Form 19b-4 filing relating to Securities Exchange Act Release No. 47140 (January 8, 2003), 68 FR 2098 (January 15, 2003) (SR-Phlx-2002-76), a copy of which is available at the Commission and the Exchange. See telephone conversation among Carla Behnfeldt, Director, New Product Development Group, Legal Department, Phlx; Joseph Morra, Special Counsel, Division, Commission; and David Hsu, Attorney, Division, Commission, on February 17, 2004.

¹³ In Amendment No. 1, the Exchange corrected an error in SR-Phlx-2002-76. In SR-Phlx-2002-76, the Exchange stated that "[t]he Exchange believes that this proposal is similar to CHX Rule 23 in that this proposal allows members to cross with interference from another member following a request for an Updated Quotation" when the Exchange should have stated that the proposal allows members to cross without interference from another member following a request for an Updated Quotation.

¹⁴ See CHX Rule 23 Interpretations and Policies Section .01 and Securities Exchange Act Release No. 46533 (September 23, 2002), 67 FR 61360 (September 30, 2003) (SR-CHX-2002-05) (approval order). See also, Securities Exchange Act Release No. 43203 (August 24, 2000), 65 FR 53067 (August 31, 2000) (SR-CHX-2000-13) (approval order).

¹⁵ 15 U.S.C. 78f(b).

¹⁶ 15 U.S.C. 78f(b)(5).

¹⁷ 15 U.S.C. 78s(b)(3)(A).

¹⁸ 17 CFR 240.19b-4(f)(6).

¹⁹ 17 CFR 200.30-3(a)(12).