

provide the Commission with additional time to review and evaluate the Extension Proposal.

The Commission notes that unless the Pilot is extended, the Pilot will expire and the provisions of Sections 312.01, 312.03, and 312.04 of the Exchange's Listed Company Manual that were amended in the Pilot will revert to those in effect prior to June 4, 1999. The Commission believes that such a result could lead to confusion.

The Commission recognizes that the Pilot has generated many comment letters from commenters that do not support the NYSE's definition of "broadly based" stock option plans. The proposed rule change merely extends the duration of the Pilot for only a short period of time and does not deal with the substantive issues presented by the Pilot itself. The Commission believes that the Pilot should be extended immediately not only to prevent confusion but also to allow the Commission, the Exchange and other market participants to continue to consider the issues involved.¹⁴

Based on these reasons, the Commission believes that it is consistent with the protection of investors and the public interest that the proposed rule change become operative as of the date of this order through January 11, 2002. 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 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. 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 above-mentioned self-regulatory organization. All submissions should refer to the File No. SR-NYSE-2001-37 and should be submitted by October 26, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁵

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44872; File No. SR-Phlx-99-52]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto Adopting Rule 51, Enforcement of Capital Funding Fee

September 28, 2001.

On December 6, 1999, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "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 adopt Phlx Rule 51, Enforcement of the Capital Funding Fee. New Rule 51 ("Rule") permits the Exchange to take certain specified measures if an owner of a membership fails to pay (or have paid on its behalf) any capital funding fee imposed by the Exchange when due. The Phlx filed an amendment to the proposal on August 9, 2001.³

The Rule specifies what enforcement action may be taken against an owner for failure to pay any capital funding fee

imposed by the Exchange. The Exchange represented that a new rule is required because existing Exchange rules do not comprehensively address situations in which owners, as opposed to members or member organizations, are required to pay the Exchange any fees. The Phlx Board determined that the enforcement mechanisms outlined in the Rule were necessary to effectuate the Exchange's capital funding fee, a central aspect of the Exchange's capital plan, for the continued viability and competitiveness of the Exchange.

The Rule delineates the remedies that shall be taken by the Board if the capital funding fee is not paid. The Rule allows for a variety of remedies ranging from the imposition of a late fee to reversion and sale by the Exchange of the equitable title to a membership. The remedies are set forth in such a way as to apply the less onerous remedies (*i.e.*, like fees) first and the more serious remedies (*i.e.*, suspension of right to trade or lease and reversion of membership) only after the Exchange has not received payment within 90 days after the date of the original invoice (or such longer period for which a lease agreement is in effect as a result of the election by a lessee to continue paying the capital funding fee). By allowing this graduated scale of remedies, the owners are put on notice as to what remedies will be imposed if payment is not received in a timely manner, with the more serious remedies being applied after a longer period of time. In addition, the Rule delineates the Board's responsibilities and authority for handling instances in which an owner fails to pay the capital funding fee when due. The Rule is designed to protect innocent lessees from being unexpectedly dispossessed from their memberships and trading rights in the event of a nonpayment by their lessors. By electing to pay the capital funding fee on behalf of an owner, the lessee may continue trading under his/her existing membership for up to three months. At the end of this period, or in the event that the lessee elects not to pay the fee on behalf of the lessor, the lessee may apply for temporary trading privileges.

The proposed rule change, as amended, was published for comment in the **Federal Register** on August 29, 2001.⁴ The Commission received no comments on the proposal.

The Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations under the Act

¹⁴ The Commission notes that on December 5, 2000 the Nasdaq Stock Market, Inc. ("Nasdaq") solicited comment from its members and investors on the NYSE Task Force's dilution standard. Nasdaq received approximately 275 comment letters on the NYSE dilution proposal, which it is currently considering.

¹⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Letter from Cynthia Hoekstra, Counsel, Phlx, to Nancy Sanow, Assistant Director, Commission, dated August 8, 2001 ("Amendment No. 1"). In Amendment No. 1 the Phlx represented that the Rule complies with Delaware corporate law, Pennsylvania contract law, and the Exchange's Certificate of Incorporation, by-laws, and rules. In addition, the Phlx modified the timing of the enforcement procedures for failure to pay the capital funding fee and included a provision for equitable reversion.

⁴ See Securities Exchange Act Release No. 44733 (August 22, 2001), 66 FR 45716.

applicable to a national securities exchange⁵ and, in particular, the requirements of Section 6 of the Act⁶ and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with the requirement of Section 6(b)(5)⁷ because it is designed to promote just and equitable principles of trade and to protect investors and the public interest by providing for enforcement action in the event that an owner fails to pay capital funding fee. The proposed rule change is also consistent with Section 6(b)(5) of the Act⁸ because it enables lessees to continue trading on the Exchange even when their respective lessors fail to pay fees owed to the Exchange when due.

The Commission is not required under Section 19(b)(2) of the Act⁹ to find that a proposed rule change by a self-regulatory organization is lawful under state corporation law; in approving this proposal, the Commission is relying on the Phlx's representation that it has the general power under applicable provisions of Delaware law to adopt the Rule. The Commission is also relying on the Phlx's representations that the Rule is permissible under Pennsylvania contract law. The Commission has not independently evaluated the accuracy of Phlx's representations regarding Delaware or Pennsylvania law.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change, as amended, (SR-Phlx-99-52) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland,

Deputy Secretary.

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⁵ In approving this proposed rule change, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁶ 15 U.S.C. 78f.

⁷ 15 U.S.C. 78f(b)(5).

⁸ *Id.*

⁹ 15 U.S.C. 78s(b)(2).

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44887; File No. SR-Phlx-2001-91]

Self-Regulatory Organizations, Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. To Facilitate the Orderly Resumption of Trading of Non-Phlx Amex Options on the Amex Facility in New York

September 28, 2001.

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 September 28, 2001, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to grant accelerated approval to the proposed rule exchange.

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

As part of the process to return American Stock Exchange LLC ("Amex") option products to its facility in New York,³ and in order to facilitate the orderly transition of non-Phlx Amex options⁴ back to the Amex, the Exchange proposes to adopt two temporary rules. First Phlx proposes to allow Exchange customers⁵ to cancel

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ On September 11, 2001, the Amex suffered physical damage to its New York facility following the terrorist attack on the World Trade Center. In addition, the large area surrounding the Amex was generally inaccessible due to rescue and clean-up efforts, and many basic services (such as electricity, water and communications lines) were not reestablished following the collapse of various buildings and ensuing fires. As an accommodation to the Amex, the Phlx listed certain "non-Phlx Amex options" as defined below, and offered to provide access to its options trading facilities, operations, technology and personnel to the Amex and Amex members, on a temporary basis, in order to facilitate an orderly return to national market system trading in listed equity options and index options by Amex members ("Temporary Arrangement"). The Commission approved the Temporary Arrangement on September 17, 2001. See Securities Exchange Act Release No. 44802 (September 17, 2001) (File Nos. SR-Amex-2001-80, SR-Phlx-2001-86) ("Order").

⁴ Non-Phlx Amex options are defined, as of the close of trading on September 10, 2001, as (a) equity options trading only on the Amex, (b) equity options traded on the Amex and another options exchange, but not the Phlx, and (c) index options traded only on the Amex.

⁵ For purposes of this proposal, "Exchange customers" means those Phlx and/or Amex

limit orders currently residing on Exchange's electronic limit order book after the close of trading on the Phlx on the trading day before the non-Phlx Amex options return to the Amex trading floor. Second, Phlx proposes a temporary rule that would require that trading in certain securities (*i.e.*, non-Phlx Amex options) be terminated at the time that the Temporary Arrangement is terminated (the "Termination Time").

Finally, the Phlx proposes to clarify that the temporary rules describe in the Order will no longer be effective and Amex Temporary Access Persons ("TAPs")⁶ will no longer have access to the Phlx options trading facilities, operations, technology and personnel, as of the Termination Time. In this regard, Amex must submit written notification to the Exchange's Membership Services Department de-registering the Amex TAPs and clerks.

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 III 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

According to the Phlx, the purpose of the proposed rule change is to facilitate the orderly resumption of trading of non-Phlx Amex options of the Amex facility in New York following their temporary listing on the Phlx facility, which was necessitated by the September 11, 2001 terrorist attacks on the World Trade Center.

Specifically, pursuant to the Order, the Phlx temporarily certified and listed, and certain Phlx specialists were granted temporary trading privileges, in non-Phlx Amex options. Upon the

members that have represented limit orders in non-Phlx Amex options currently residing on the Exchange's electronic limit order book.

⁶ See Order, note 3, *supra*. Certain provisions in the agreement between the Phlx and the Amex concerning the Temporary Arrangement, such as limitation of liability, delegation of regulatory and enforcement jurisdiction, payment of transaction fees, and arbitration provisions, will continue to be in effect after the Termination Time.