

DTC-2001-12) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁷

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44886; File No. SR-NYSE-2001-37]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. Extending the Pilot Regarding Shareholder Approval of Stock Option Plans Through January 11, 2002

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 26, 2001, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, III below, which Items have been prepared by the Exchange. 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 Exchange proposes to extend, until January 11, 2002, the effectiveness of the amendments to Sections 312.01, 312.03 and 312.04 of the Exchange's Listed Company Manual with respect to the definition of a "broadly-based" stock option plan, which amendments were approved by the Commission on a pilot basis (the "Pilot") on June 4, 1999.³ The Pilot was subsequently amended on March 30, 2001.⁴

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

On July 13, 2000, the Exchange filed a proposed rule change seeking to extend the effectiveness of the Pilot until September 30, 2003.⁵ Following receipt of comments from interested parties and the SEC staff, on January 19, 2001, the Exchange amended the 2000 Extension Request to shorten the three-year extension request to one year and to amend the definition of "broadly based" under the Exchange's rule. While the 2000 Extension Request was under consideration, the Commission extended the Pilot to provide the Commission and the Exchange with additional time to review and evaluate comment letters.⁶ ON March 30, 2001 the Commission approved the 2000 Extension Request on a pilot basis until September 30, 2001.⁷

The Exchange proposes to further extend the effectiveness of the Pilot until January 11, 2002 to provide additional time to evaluate the issues presented by the Pilot.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,⁸ which requires, among other things, that an Exchange have rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating

transactions in securities, 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.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Because the proposed rule change (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act⁹ and Rule 19b-4(f)(6)¹⁰ thereunder.¹¹

A proposed rule change filed under Rule 19b-4(f)(6)¹² normally does not become operative prior to 30 days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹³ to Commission may designate a shorter time if such action is consistent with the protection of investors and public interest. The Exchange seeks to have the proposed rule change become operative on or before September 30, 2001, in order to allow the Pilot to continue in effect on an uninterrupted basis.

The Commission, consistent with the protection of investors and the public interest, has determined to make the proposed rule change operative as of the date of this order through January 11, 2002. The extension of the Pilot will

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f)(6).

¹¹ As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date or such shorter time as designated by the Commission.

¹² 17 CFR 240.19b-4(f)(6).

¹³ 17 CFR 240.19b-4(f)(6)(iii).

⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-2.

³ Securities Exchange Act Release No. 41479, 64 FR 31667 (June 11, 2001).

⁴ Securities Exchange Act Release No. 44141, 66 FR 18334 (April 6, 2001) ("2000 Extension Request").

⁵ See Securities Exchange Act Release No. 43111 (August 2, 2000), 65 FR 49046 (August 10, 2000).

⁶ Securities Exchange Act Releases Nos. 43329 (October 2, 2000), 65 FR 5883 (October 2, 2000); 43647 (November 30, 2000), 65 FR 77407 (December 11, 2000); and 44018 (February 28, 2001), 66 FR 13821 (March 7, 2001).

⁷ See note 4 *supra*.

⁸ 15 U.S.C. 78f(b)(5).

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

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

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.

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.