

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

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

Written comments were neither solicited nor 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 Act<sup>13</sup> and Rule 19b-4(f)(6) thereunder.<sup>14</sup> 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.

Nasdaq has requested that the Commission waive the 30-day operative delay. The Commission believes waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Acceleration of the operative date will allow Nasdaq to implement the change in terminology immediately, thereby ensuring that the proper terminology is in place for the launch of SuperMontage. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>15</sup>

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal 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 NASD. All submissions should refer to file number SR-NASD-2002-114 and should be submitted by September 18, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46383; File No. SR-Phlx-2002-41]

#### Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Capital Funding Fee Late Charge

August 20, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 16, 2002, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, and II below, which Items have been prepared by the Phlx. 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 Phlx proposes to amend the amount of the late charge that is

imposed by the Exchange as set forth in Phlx Rule 51, *Enforcement of Capital Funding Fee*.<sup>3</sup> Currently, the late charge is set at a monthly rate of 1 percent (simple interest) for each thirty-day period or fraction thereof, calculated on a daily basis, commencing with the twenty-first day. The Exchange now proposes to increase the amount of the late charge from 1 percent to 1.5 percent. In addition, the Exchange proposes to extend the invoice due date for the capital funding fee from twenty days to thirty days. Thus, the proposed rule change would require the capital funding fee to be paid within thirty days from the invoice date, with the new monthly late charge of 1.5 percent commencing on the thirty-first day. All other provisions of Phlx Rule 51 would remain the same.

The text of the proposed rule change is set forth below. New text is italicized; deleted text is bracketed.

#### Rule 51. Enforcement of Capital Funding Fee

##### Notice and Late Charges

(a) The Exchange shall issue invoices to each owner (for purposes of this Rule, an "Obligor") providing notice of the obligation to pay the capital funding fee within *thirty* [twenty] days from the invoice date. If an Obligor fails to pay the Exchange the capital funding fee by the due date, the Exchange shall provide a written Late Notice of such failure (the "Late Notice") and, subject to subsection (b), impose a late charge at a monthly rate of 1.5 [1] percent (simple interest) for each thirty-day period or fraction thereof, calculated on a daily basis, commencing with the *thirty-first* [twenty-first] day.

\* \* \* \* \*

The Exchange proposes that if approved, changes to Phlx Rule 51 would become operative on September 1, 2002.<sup>4</sup> Accordingly, proposed changes to Phlx Rule 51 would apply to all capital funding fee account receivable balances due to the Exchange on or after that date. For example, delinquent balances due to the Exchange in August 2002 at a rate of 1

<sup>3</sup> See Securities Exchange Act Release No. 44872 (September 28, 2001), 66 FR 51084 (October 5, 2001)(SR-Phlx-99-52). The capital funding fee is currently a \$1,500 fee imposed monthly on owners of Phlx memberships.

<sup>4</sup> Telephone conversation between Cynthia K. Hoekstra, Counsel, Phlx, and Steven G. Johnston, Special Counsel, Division of Market Regulation, Commission, July 30, 2002 (clarifying the Exchange's proposal to delay the operative date of proposed changes to Phlx Rule 51 until September 1, 2002).

<sup>13</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>14</sup> 17 CFR 240.19b-4(f)(6).

<sup>15</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>16</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

percent would be charged a rate of 1.5 percent as of September 1, 2002.

## 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

The purpose of the proposed rule change is to increase the amount of the late charge imposed by the Exchange pursuant to Phlx Rule 51 from 1 percent to 1.5 percent and to extend the invoice due date to thirty days, thereby making these provisions more consistent with Exchange Rule 50, *Late Charge*.<sup>5</sup> In addition, increasing the late charge and extending the invoice due date should encourage members to pay the capital funding fee to the Exchange on a timely basis. This, in turn, should deter the practice of late payments.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act<sup>6</sup> in general, and furthers the objectives of section 6(b)(4) of the Act<sup>7</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities who do not make timely payments to the Exchange. In addition,

<sup>5</sup> Current Phlx Rule 50 provides, in part, that a late charge of 1.5 percent simple interest for each thirty-day period or fraction thereof, calculated on a daily basis, during which accounts payable to the Exchange remain outstanding, is imposed upon any member, member organization, participant or participant organization or an employee thereof using the facilities or services of the Exchange, or enjoying any of the privileges therein for dues, foreign currency options users' fees, fees, other charges, fines, and/or other monetary sanctions or other monies due and owed the Exchange and not paid within 30 days after the date of the original invoice. The Exchange represents that an account is not subject to a late charge until the unpaid balance remains outstanding at least 31 days. See Securities Exchange Act Release No. 45681 (April 2, 2002), 67 FR 17098 (April 9, 2002) (File No. SR-Phlx-2002-19).

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(4).

Phlx believes that the proposal should promote just and equitable principles of trade and protect investors and the public interest, consistent with section 6(b)(5) of the Act,<sup>8</sup> by imposing a higher interest rate and extending the invoice due date, which should, in turn, encourage prompt payment of capital funding fees to the Exchange by an owner of a Phlx membership.

### 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 either solicited or received with respect to the proposed rule change.

## III. 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 Phlx. All submissions should refer to File No. SR-Phlx-2002-41 and should be submitted by September 18, 2002.

## IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission has reviewed this proposed rule change and finds it consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national

securities exchange.<sup>9</sup> Specifically, the Commission finds the proposal to be consistent with section 6(b)(4) of the Act.<sup>10</sup> Since the proposed provisions would be uniformly applied to all seat owners with outstanding balances, the amendment conforms to the requirement of the Act that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

The Phlx has requested that the Commission approve the proposed rule change on an accelerated basis. The Exchange represents that accelerated approval of its proposal should encourage prompt payment of outstanding capital funding fee balances and should assist the Exchange with collecting funds owed to it in a timely fashion. Further, the Phlx states that the proposed increase in the late charge for the capital funding fee is similar to an increase it imposed recently on members with outstanding accounts payable.<sup>11</sup> The Commission notes that Phlx Rule 51 requires the Exchange to give owners notice of each due date for the capital funding fee as well as written notice of late charges if payment is not made. Further, the proposed rule change extends the time after which the Exchange will impose late charges from 21 days to 31 days. The Commission believes that the proposal will permit the Exchange to collect the capital funding fee in a more timely fashion. Accordingly, the Commission finds good cause for approving the proposed rule change (SR-Phlx-2002-41) prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**.

## V. Conclusion

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change (SR-Phlx-2002-41) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Margaret H. McFarland**,  
Deputy Secretary.

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<sup>9</sup> In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>10</sup> 15 U.S.C. 78f(b)(4).

<sup>11</sup> See note 5 *supra*.

<sup>12</sup> 15 U.S.C. 78s(b)(2).

<sup>13</sup> 17 CFR 200.30-3(a)(12).

<sup>8</sup> 15 U.S.C. 78f(b)(5).