

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 at the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR-Phlx-2002-83 and should be submitted by January 31, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

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

[FR Doc. 03-457 Filed 1-9-03; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47118; File No. SR-Phlx-2002-34]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 and No. 2 thereto by the Philadelphia Stock Exchange, Inc. to Adopt a Seat Transaction Policy and Add Supplementary Material to Phlx Rule 708

January 2, 2003.

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 June 21, 2002, 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 December 16, 2002, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> On December 27, 2002,

the Exchange filed Amendment No. 2 to the proposed rule change.<sup>4</sup> 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 Exchange proposes to adopt a Seat Transaction Policy for Governors, Committee Members and Associated Member Organizations ("Seat Transaction Policy" or the "Policy"), described in further detail below, which, if approved, will form a part of the Exchange's Code of Conduct for Governors and Committee Members (the "Governance Members Code of Conduct"), which prohibits Exchange Governors, Committee Members and Member Firms associated with them from engaging in purchases or sales of Exchange "Seats" (as further defined below), except in accordance with the Policy. The Policy generally restricts such Seat Transactions if a Governance Member is in possession of Material Confidential Information<sup>5</sup> of the Exchange, except in accordance with the procedures set forth in the Policy. In addition, the Exchange proposes to amend Phlx Rule 708, *Acts Detrimental to the Interest and Welfare of the Exchange*, by adding commentary that provides notice to members and member organizations that any violation of the Exchange's Seat Transaction Policy constitutes a violation of Phlx Rule 708. Below is the text of the proposed rule change. Proposed new language is in italics.

\* \* \* \* \*

#### *Philadelphia Stock Exchange*

#### *Code of Conduct for Board Members and Committee Members*

Articles I. thru IV. No change.

#### *Article V. Seat Transaction Policy for Governors and Committee Members*

##### *Chinese Wall*

*A Chinese Wall, also known as an Information Barrier, is an internal written policy of an Exchange or PBOT member firm or member organization that is designed to prevent the*

2002 ("Amendment No.1"). Amendment No. 1 replaces Phlx's original proposal in its entirety.

<sup>4</sup> See letter from John Dayton, Assistant Secretary and Counsel, Phlx, to Florence Harmon, Senior Special Counsel, Division of Market Regulation ("Division"), Commission, dated December 27, 2002 ("Amendment No. 2"). Amendment No. 2 makes certain technical changes to the proposed rule change.

<sup>5</sup> See definition of Material Confidential Information, below.

*disclosure by a Governor or Committee Member associated with such Exchange or PBOT member firm or member organization, or FCO Participant or FCO Participant Organization (collectively, "Member Organizations"), of non-public, confidential or otherwise sensitive Exchange or PBOT information possessed by such Governor or Committee Member to any third party, including, without limitation, any employee, agent, associated person, representative or consultant of such Member Organization, as the case may be.*

#### *Material Confidential Information*

*Material Confidential Information includes any information that is proprietary to the Exchange, which a reasonable person would consider significant or important when purchasing or selling a Seat.*

#### *Seat Transaction*

*A transaction pursuant to which a Covered Person or a Member Organization purchases or sells a Seat.*

#### *Special Committee on Seat Transactions*

*The Special Committee on Governor and Committee Member Seat Transactions ("Special Committee") is a Special Committee of the Board having jurisdiction over all Seat Transactions by Covered Persons or Member Organizations.*

#### *Window Period*

*A Window Period is a period of time, imposed by the Special Committee on Seat Transactions, during which a Covered Person or associated Member Organization may not engage in a Seat Transaction, such as a period of time prior to the announcement of new products to be traded on the Exchange, prior to the announcement of a corporate transaction involving the Exchange, prior to the announcement of certain regulatory actions affecting the Exchange, prior to the announcement of an increase or decrease in fees to be paid by the Exchange members, or prior to the announcement of any significant action by the Board of Governors or any Committee.*

#### *1. Responsibility for Compliance*

*(a) Each Covered Person<sup>6</sup> bears personal responsibility for complying with this Seat Transaction Policy. Each Member Organization associated with a Covered Person must also comply with this Seat Transaction Policy. Where a*

<sup>6</sup> As used in the Seat Transaction Policy, "Covered Person" shall mean any person who serves the Exchange as a Board Member or as a Committee Member.

<sup>14</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.

<sup>3</sup> See letter from John Dayton, Assistant Secretary and Counsel, Phlx, to Florence Harmon, Senior Special Counsel, Division of Market Regulation ("Division"), Commission, dated December 13,

Covered Person serves as a principal, director or officer of a Member Organization, any Seat Transaction by that Member Organization, without more, has the potential for violating the duties described in this Code of Conduct. Seat Transactions by such Member Organizations are subject to review by the Special Committee.

(b) If the Special Committee permits the Covered Person or Member Organization to proceed with a transaction, in accordance with the procedures provided herein, the Covered Person and/or Member Organization nonetheless retains ultimate responsibility for determining whether to proceed with the Seat Transaction and what their disclosure obligations are to the other party in the Seat Transaction. The decision of the Special Committee is for the sole benefit of the Exchange, and is not intended to insulate the Covered Person or Member Organization from responsibility for their conduct in connection with a Seat Transaction under any applicable law. This Seat Transaction Policy is limited to whether the Covered Person or Member Organization's conduct complies with this Code of Conduct and does not purport to affect the rights and obligations of Covered Persons, Member Organizations and others under applicable law and/or contract.

## 2. Authority to Review Seat Transactions for Compliance with Code of Conduct

The Board of Governors has established a Special Committee on Seat Transactions ("Special Committee"), which shall have full authority to review Seat Transactions by Covered Persons and associated Member Organizations. Every Covered Person and any associated Member Organization shall cooperate fully with any such review. The Special Committee may initiate a review of a Seat Transaction at the request of the Covered Person or associated Member Organization prior to the consummation of the Seat Transaction. The Special Committee may also initiate a review of a Seat Transaction at the direction of the Board of Governors, the Executive Committee, or on its own initiative.

## 3. Special Committee Procedures

(a) The Special Committee shall have three members, all of whom are Governors and at least one of whom is a Public Governor. The Special Committee's decisions are governed by Section 10-3(a) of the Phlx By-Laws. In addition, the Board of Governors directs that at least one of the members making any quorum be a Public Governor. At

the time a Seat Transaction is contemplated, a Covered Person is obliged to notify the Board of Governors by contacting, in writing, the General Counsel, Deputy General Counsel, Corporate Secretary, or Assistant Secretary of any pending Seat Transaction. The Special Committee shall convene promptly after such notification to review the Seat Transaction. The Special Committee shall make all reasonable efforts to respond to the Covered Person rapidly and within a time frame requested by the Covered Person. It is understood that in some cases the Special Committee will be asked to review a Seat Transaction within 24 hours of notification by the Covered Person. In any case, the Special Committee must either render a decision, conduct an interview with the Covered Person, or request additional information from the Covered Person within 15 business days from the time of request. If the Special Committee conducts an interview with the Covered Person or requests additional information from the Covered Person, then the Special Committee must render a decision within 30 business days from the later to occur of (i) the interview, or (ii) if further information is requested by the Special Committee; all requested information is supplied to the Special Committee, provided that a Covered Person may waive compliance with these deadlines. The Special Committee shall render its decision, in writing, to the Covered Person or Member Organization, as well as to the Board of Governors, in regard to whether the proposed Seat Transaction complies with this Seat Transaction Policy and the Code of Conduct. All decisions of the Special Committee may be appealed to the Board of Governors by an aggrieved Covered Person or Member Organization by written notice filed with the Corporate Secretary within thirty (30) days of such Special Committee decision.

(b) The Special Committee is authorized to interview the Covered Person and others in the associated Member Organization involved in a Seat Transaction. The Special Committee shall determine whether the information in the possession of the Covered Person or Member Organization is Confidential Information as defined in the Code of Conduct. The Special Committee shall then determine whether such Confidential Information is Material Confidential Information. The Special Committee shall determine whether any Material Confidential Information must be disclosed in connection with the Seat

Transaction and, if so, what Material Confidential Information should be disclosed. The Special Committee shall also determine whether an agreement protecting the confidentiality of such Material Confidential Information and which names the Exchange as an intended third-party beneficiary should be in place between the Covered Person or the Member Organization and the other party to the Seat Transaction prior to the disclosure. The Special Committee is authorized to develop general standards and procedures in connection with its evaluation of Seat Transactions by Covered Persons.

(c) If the Special Committee determines that Material Confidential Information should not be disclosed, it may prohibit the Covered Person or Member Organization from proceeding with the transaction until such time as the Material Confidential Information is no longer confidential or material or until such time as the Material Confidential Information may be disclosed. The determination by the Special Committee (including, without limitation, the Special Committee's views concerning the sufficiency or insufficiency of a Member Organization's Chinese Wall arrangements for purposes of this policy, as described in section 4 below) is in no way a legal determination as to whether the Confidential Information is material from the point of view of federal or state law (e.g., under the federal securities laws or state common law concerning fraud or misrepresentation) or whether the Covered Person or Member Organization would have any liability to a party other than the Exchange for proceeding with a Seat Transaction. Covered Persons and Member Organizations should be reminded that they should consult with their own counsel about all matters arising from Seat Transactions when the Covered Person is in possession of Confidential Information.

## 4. Scope of Special Committee's Jurisdiction

The Special Committee is authorized to render binding decisions regarding Seat Transactions where a Covered Person or an associated Member Organization is involved. The Special Committee's determination shall be limited to: (1) Whether a Seat Transaction may proceed without any disclosure of Material Confidential Information; (2) whether the Member Organization involved in the Seat Transaction has a "Chinese Wall" or information barrier in place to prevent disclosure of Material Confidential Information and, if so, whether such

“Chinese Wall” or information barrier should be regarded as being sufficient to justify the Special Committee to permit a Member Organization or person affiliated therewith, who is not a Covered Person and who is not in possession of Material Confidential Information to proceed with the Seat Transaction; (3) whether the Seat Transaction may proceed only after approved disclosures of Material Confidential Information to the other party in the Seat Transaction and, in such event, whether a confidentiality agreement is needed to protect any Material Confidential Information from being disclosed; or (4) whether the Seat Transaction can not proceed at the current time or during certain Window Periods established by the Special Committee.

#### 5. Consequences of Violations of Seat Transaction Policy

Violations of this Seat Transaction Policy will result in appropriate disciplinary action in accordance with Exchange Rules (which may include, without limitation, Phlx Rule 708). In addition, where it has been determined that applicable laws, rules or regulations may have been violated in connection with a violation of this Seat Transaction Policy, appropriate disciplinary action may include legal action by the Exchange or PBOT or the referral of the matter to an appropriate governmental agency.

#### 6. Right of Appeal of Special Committee Decisions

Decisions of the Special Committee may be appealed by the Covered Person or associated Member Organization to the Board of Governors as if such decision were rendered by a Standing Committee of the Board of Governors, in accordance with Phlx By-Laws 11-1(a) and 11-2. The decision on review by the advisory committee on appeals of the Board of Governors pursuant to Phlx By-Law 11-2 shall constitute a final decision by the Exchange, upon the acceptance by the Board of Governors of the advisory opinion of such advisory committee on appeals.

\* \* \* \* \*

#### Rule 708. Acts Detrimental to the Interest or Welfare of the Exchange

A member, member organization, or person associated with or employed by a member or member organization shall not engage in acts detrimental to the interest or welfare of the Exchange.

##### Commentary:

.01 Acts which could be deemed detrimental to the interest or welfare of

the Exchange include, but are not limited to, the following:

(a) thru (e) No change.

(f) any action by a member of the Board of Governors or any Exchange Committee, or by any member organization associated with such member, which contravenes the Seat Transaction Policy contained in Article V of the Code of Conduct for Governors and Committee Members.

\* \* \* \* \*

#### II. Self-Regulatory Organization's Statement Regarding 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

The purpose of the proposed rule change is (i) To amend the Exchange's Code of Conduct for Governors and Committee Members, by adopting a Seat Transaction Policy, which generally prohibits members of the Phlx Board of Governors or of any Exchange Committee (a “Governance Member”)<sup>7</sup> and any Phlx member firm or corporation associated with such Governance Member (a “Member Organization”) from engaging in purchases or sales of Exchange memberships, except in compliance with the Policy, and (ii) to codify the Exchange's policy that a violation of the Exchange's Seat Transaction Policy by a Governance Member or any Member Organization constitutes a violation of Phlx Rule 708, *Acts Detrimental to the Interest and Welfare of the Exchange*, and such conduct is therefore subject to disciplinary action by the Exchange.<sup>8</sup>

<sup>7</sup> The Exchange notes that the Policy uses the term “Covered Person” instead of the term “Governance Member,” which is used here. These terms are synonymous.

<sup>8</sup> The Exchange notes that Phlx Rule 708, as well as Phlx Rule 707 (pertaining to just and equitable principles of trade), could apply to a wide variety of situations. The specific scenarios listed in the commentary to Phlx Rules 707 and 708 are intended to illustrate some, but not all, of the situations that violate these Rules. As stated in the

The proposed rule change would establish procedures for the purchase or sale<sup>9</sup> of a Phlx membership, foreign currency option (“FCO”) participation, or Philadelphia Board of Trade (“PBOT”) membership (each an “Exchange Seat” or a “Seat”), by a Governance Member or Member Organization. In general, the Policy prohibits such Seat Transactions while such Governance Member or Member Organization possesses “Material Confidential Information” of the Exchange except insofar as such transaction complies with the Policy. In addition, proposed commentary to Phlx Rule 708 would make clear that violations of the Policy may constitute an act detrimental to the interests and welfare of the Exchange and therefore that rule. Accordingly, both the Seat Transaction Policy and the proposed amendment of commentary to Phlx Rule 708 would, pursuant to Phlx By-Laws 18-1 and 18-3, expressly allow the Exchange to bring a disciplinary action, as appropriate, against Governance Members and Member Organizations for violations of the Seat Transaction Policy. Neither the Seat Transaction Policy nor the proposed amendment of Phlx Rule 708, Commentary .01 would apply to Exchange members other than Governors, Committee Members and their associated Member Organizations.

##### Background

The Exchange adopted the Seat Transaction Policy as an amendment to the Governance Members Code of Conduct. The Seat Transaction Policy recognizes that Governance Members may be subject to conflicting duties whenever they engage in a transaction to purchase or sell an Exchange Seat.

On the one hand, a Governance Member, or a Member Organization for which such Governor is an officer or director, must own or lease an Exchange

Commission's order approving Phlx Rule 708, the Exchange has determined, for various reasons, to list certain conduct that violates Phlx Rule 708, but not others. See Exchange Act Release No. 33850 (April 1, 1994), 59 FR 16874 (April 8, 1994) (File No. SR-Phlx-93-53). Similarly, the Exchange also notes that it has previously amended the commentary to Phlx Rule 707 in order to add certain violations of the Phlx Code of Conduct to the non-exclusive list of potential violations of Phlx Rule 707. See, e.g., Exchange Release No. 43739 (December 19, 2000) 65 FR 82440 (December 28, 2000) (File No. SR-Phlx-00-94) (order approving proposal to prohibit members, member organizations, and persons associated with or employed by a member or member organization from engaging in harassment or other improper behavior in connection with listing or competitive practices).

<sup>9</sup> The Governance Members Code of Conduct provisions described herein would only address the purchase or sale of a Seat, not other transactions involving Seats, such as lease transactions.

Seat to conduct business on the Exchange. Governance Members and Member Organizations may also purchase an Exchange Seat in order to lease it to third persons with the expectation of lease income and appreciation in the value of the Exchange Seat itself. However, as a result of their governance positions on the Board or on an Exchange Committee, Governance Members may learn Material Confidential Information regarding the Exchange that may affect the value of all Exchange Seats, or the value of particular Exchange Seats. As defined in the Seat Transaction Policy, Material Confidential Information is confidential and proprietary to the Exchange and may not, under the Governance Members Code of Conduct, Exchange policy, and applicable law, be disclosed or used for personal gain.

On the other hand, the Exchange notes that failure to disclose Material Confidential Information to a potential purchaser or seller of an Exchange Seat could expose the Governance Member and/or Member Organization to liability to the potential purchaser or seller under state law. Any time a Governance Member purchases or sells an Exchange Seat while the Governance Member possesses such Material Confidential Information, the Exchange states that the Governance Member and (as a consequence of information sharing by such Governance Member with other persons at his/her associated Member Organization) Member Organization could be exposed to disciplinary action, liability, and disrepute. The Exchange states that such conduct by the Governance Member or Member Organization could also expose the Exchange to disrepute.

Therefore, the Exchange adopted the Seat Transaction Policy in order to resolve the tension between a Governance Member's and/or Member Organization's legitimate business needs to purchase or sell Exchange Seats from time to time and the Exchange's legitimate business interest in preventing disclosure of Material Confidential Information to anyone involved in a Seat Transaction.

The Exchange notes that in many cases, disclosure of Material Confidential Information to the other purchaser or seller in the Seat Transaction would put the Governance Member or Member Organization and the buyer or seller on equal footing in order to negotiate a fair price for the Seat—and could in some cases be legally required in order to avoid liability to the party with whom the Governance Member or Member Organization is dealing. However,

Governance Members are required by the Governance Members Code of Conduct to keep Material Confidential Information confidential. The Exchange states that the Seat Transaction Policy is designed to accommodate both of these interests by allowing a Special Committee to review the facts surrounding a seat transaction and, if necessary, to impose conditions on the seat transaction in order to prevent or limit disclosure of Material Confidential Information of the Exchange to third parties.

#### Seat Transaction Policy

In Articles V.1 and V.2 of the proposed Seat Transaction Policy, the Exchange proposes to create a new Special Committee (the "Special Committee") of the Board of Governors that would oversee Seat Transactions by Governance Members and Member Organizations.<sup>10</sup> Article V.3 would provide that the Special Committee, which is to be composed of three members, all of whom are Governors and at least one of whom is a Public Governor, would be responsible for examining the facts of each proposed Seat Transaction by a Governance Member or Member Organization.<sup>11</sup> Article V.4 of the Seat Transaction Policy empowers the Special Committee to prohibit any Governance Member or Member Organization from entering into a Seat Transaction while they possess Material Confidential Information of the Exchange.

Article V.3 of the Seat Transaction Policy further provides that the Special

<sup>10</sup> If the entire Special Committee cannot be convened, the Special Committee may proceed with a quorum of its members or may proceed with substituted members appointed by the Board of Governors or the Board's Executive Committee. By-law Article X, section 10-3(a) sets the quorum of the Special Committee as the majority of its members then in office. A quorum of the Special Committee, therefore, is two members. In addition to the quorum requirements in By-law Article X, section 10-3(a), the Board directs that at least one of the members making a quorum be a Public Governor. The Special Committee could take action, pursuant to By-law Article X, section 10-3(a), if a majority of those voting at a meeting at which a quorum is present vote in favor of the motion at hand, provided at least two vote. The Board of Governors or the Board's Executive Committee could appoint substituted members to the Special Committee, as needed. By-law Article IV, Section 4-4(b)(ix) empowers the Board to designate and appoint special committees, such as the one at hand. The Board may appoint additional Governors to the Special Committee to fill-in for absent Governors. In addition, the Board's Executive Committee, by resolution of the Board passed on December 11, 2002, may appoint Governors to the Special Committee to fill-in for absent Governors.

<sup>11</sup> The members of the Special Committee are subject to the conflict avoidance and recusal provisions that are in By-law Article IV, Section 4-8 and in the Governance Member Code of Conduct, Article III.6.

Committee may impose certain specified restrictions upon a Seat Transaction to prevent potential misuse or disclosure of Material Confidential Information by the Governance Member or Member Organization,<sup>12</sup> or by the person or firm on the other side of the Seat Transaction. As proposed, the Special Committee would determine whether it is appropriate for such Material Confidential Information to be disclosed by the Governance Member or Member Organization in connection with a proposed Seat Transaction. The Special Committee would also require that a confidentiality agreement be established between the Governance Member or Member Organization and the person on the other side of the Seat Transaction. If such a confidentiality agreement is required, the Seat Transaction Policy would require that the Exchange be named as an intended third-party beneficiary of the agreement.

Proposed Article V.4 provides that, the Special Committee may prohibit any Governance Member or Member Organization from consummating a Seat Transaction under conditions contrary to the conditions set forth by the Special Committee, or during certain "window periods"<sup>13</sup> specified by the Special Committee.

#### Governance Member Responsibilities

Proposed Article V.3(a) requires that at the time a Seat Transaction is contemplated, the Governance Member or Member Organization notify the Board of Governors by notifying certain Exchange officers.<sup>14</sup> Article V.3(a) further requires that the Special Committee convene promptly after such

<sup>12</sup> The Exchange states that the Seat Transaction Policy recognizes that it may not in all instances be appropriate to attribute Material Confidential Information possessed by a Governance Member to the entire Member Organization for which he/she serves as an officer or director. Consistent with the policies of the federal securities laws (see, e.g., Rule 14e-3 under the Act, 17 CFR 240.14e-3, and Phlx Rule 1020(f)), the Policy authorizes the Special Committee to review any information barriers that a Member Organization may have established to restrict the flow of Material Confidential Information within its organization and to take the existence of such information barriers into account when reviewing a proposed Seat Transaction.

<sup>13</sup> An example of a "window period" during which Seat Transactions may be prohibited is prior to the announcement of a significant transaction involving the Exchange.

<sup>14</sup> Except to the extent that the Special Committee excuses a Governance Member or Member Organization as provided in the next sentence, this is mandatory in respect of all Seat Transactions by Governance Members and their Member Organizations. However, the Special Committee could excuse the Governance Member or Member Organization from this disclosure requirement if the Special Committee determines that all or certain future disclosures are rendered unnecessary by the implementation and operation of the information barriers described in footnote 12, above.

notification to review the proposed Seat Transaction. Understanding that the Governance Member or Member Organization may need to act quickly in order to consummate a Seat Transaction, Article V.3(a) of the Seat Transaction Policy mandates the Special Committee to make all reasonable efforts to respond to the Governance Member or Member Organization rapidly and within a time frame requested by such person. The Seat Transaction Policy therefore anticipates that, in certain cases, the Special Committee will be asked to review a Seat Transaction within 24 hours of notification of the Board of Governors by the Governance Member or Member Organization. In any case, the Special Committee must either render a decision, conduct an interview with the Governance Member, or request additional information from the Governance Member within 15 business days from the time of request. If the Special Committee conducts an interview with the Governance Member or requests additional information from the Governance Member, than the Special Committee must render a decision within 30 business days from the later to occur of (i) the interview or, (ii) if further information is requested by the Special Committee, all requested information is supplied to the Special Committee; provided that a Governance Member may waive compliance with these deadlines.

#### Special Committee Procedures

Article V.4 of the Seat Transaction Policy requires the Special Committee to render a binding written decision to the Governance Member or Member Organization, as well as to the Board of Governors, regarding whether the proposed Seat Transaction complies with the Seat Transaction Policy. Articles V.3 and V.4 provide further procedures to be followed by the Special Committee in reviewing Seat Transactions. An aggrieved Governance Member or Member Organization may appeal decisions of the Special Committee to the Board of Governors consistent with Article XI of the Phlx By-Laws, by filing a written notice with the Secretary of the Exchange within thirty (30) days of the Special Committee's decision.

Proposed Articles V.3(d) and V.4 specify the remedies that the Special Committee may impose in the event it determines that a Governance Member or Member organization possess Material Confidential Information at the time of a Seat Transaction. These remedies include (i) prohibiting the Seat Transaction until such time as the Material Confidential Information is no

longer confidential; (ii) requiring that Material Confidential Information be disclosed to the other party, but only after a non-disclosure agreement between the parties is in place; and (iii) disallowing the Seat Transaction to proceed, but only during certain "window periods" established by the Special Committee.

#### Disciplinary Consequences

Under amended Phlx Rule 708, the Exchange proposes to provide notice to Governance Members and Member Organizations that the failure by any Governance Member or Member Organization to comply with the Seat Transaction Policy constitutes a violation of Phlx Rule 708, *Acts Detrimental to the Interest and Welfare of the Exchange*, and would thereby subject such Governance Member or Member Organization to disciplinary action by the Exchange pursuant to Phlx By-Laws 18-1 and 18-3.<sup>15</sup> The Exchange states that Article V.3(b) of the Seat Transaction Policy makes clear that any determination by the Special Committee is for the sole benefit of the Exchange and is limited to the question whether a Governance Member or Member Organization's conduct complies with the Governance Member Code of Conduct. The Special Committee's decisions do not constitute legal advice and are not intended to affect the rights and obligations of Governance Members and Member Organizations under any applicable law or under any contract with third parties, including purchasers or sellers of Exchange Seats.

#### 2. Statutory Basis

The Phlx believes that the proposed rule change, as amended, is consistent

<sup>15</sup> The Exchange notes that conduct that violates the Seat Transaction Policy could also violate various laws and that no inference should be drawn that the Exchange's remedies for violative conduct are limited to disciplinary action under By-Laws 18-1 and 18-3. However, the Exchange notes that Seats have never been regarded as "securities" for purposes of the federal securities laws. Therefore, Seat Transactions would not be subject to the provisions of the federal securities laws prohibiting deceptive and manipulative practices "in connection with the sale of securities." (See, e.g., Section 10 of the Act, 15 U.S.C. 78j, and Rule 10b-5 under the Act, 17 CFR 240.10b-5.) See *Ferreri v. Goldberg Securities, Inc.*, 1989 WL 11073, 2-3 (E.D. Pa. 1989) ("it is the view of this Court that plaintiff's two [Seats] do not constitute 'securities'"); letter to Clifford Lefebvre, Esq., Baker, Nelson & Williams from John Heneghan, Deputy Chief Counsel, Office of the Chief Counsel, Commission dated March 12, 1973; letter to European Mercantile Exchange Limited from Brian Lynch, Attorney-Adviser, Division of Corporation Finance, Commission dated October 11, 1988; letter to American Stock Exchange—NASD from Michael Hyatte, Special Counsel, Division of Corporation Finance, Commission, dated July 10, 1998.

with the provisions of section 6 of the Act,<sup>16</sup> in general, and in particular, with sections 6(b)(3) and 6(b)(5) of the Act,<sup>17</sup> in that it is designed to regulate fairly and in the public interest the administration of the Exchange; with section 6(b)(5), in that it is designed to prevent fraudulent and manipulative acts and practices; and with section 6(b)(6), in that it is designed to appropriately discipline members for violation of the rules of the Exchange. Specifically, the Phlx believes that the Seat Transaction Policy, as specified in the Governance Members Code of Conduct, and Rule 708, as amended, should discourage fraudulent and manipulative acts and practices in connection with the purchase or sale of Exchange Seats by Governance Members, who owe a fiduciary duty to the Exchange and its members, and by Member Organizations, which are each prohibited from taking actions that are detrimental to the interests or welfare of the Exchange.

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

The Phlx 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.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Phlx consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

#### 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

<sup>16</sup> 15 U.S.C. 78f(b).

<sup>17</sup> 15 U.S.C. 78f(b)(3) and (b)(5).

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-2002-34 and should be submitted by January 31, 2003.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>18</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 03-460 Filed 1-9-03; 8:45 am]

**BILLING CODE 8010-01-P**

## SMALL BUSINESS ADMINISTRATION

### [Declaration of Disaster #3473]

#### State of Alaska (Amendment #2)

In accordance with information received from the Federal Emergency Management Agency dated December 20, 2002, the above-numbered declaration is hereby amended to establish the incident period as beginning on October 23, 2002 and continuing through December 20, 2002.

All other information remains the same, *i.e.*, the deadline for filing applications for physical damage is February 3, 2003, and for economic injury the deadline is September 4, 2003.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: December 31, 2002.

**S. George Camp,**

*Acting Associate Administrator for Disaster Assistance.*

[FR Doc. 03-508 Filed 1-9-03; 8:45 am]

**BILLING CODE 8025-01-P**

## SMALL BUSINESS ADMINISTRATION

### [Declaration of Disaster #3475]

#### Territory of Guam (Amendment #1)

In accordance with information received from the Federal Emergency Management Agency dated December 16, 2002, the above-numbered declaration is hereby amended to establish the incident period as beginning on December 8, 2002 and continuing through December 16, 2002.

All other information remains the same, *i.e.*, the deadline for filing applications for physical damage is February 18, 2003, and for economic injury the deadline is September 19, 2003.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: December 31, 2002.

**S. George Camp,**

*Acting Associate Administrator for Disaster Assistance.*

[FR Doc. 03-513 Filed 1-9-03; 8:45 am]

**BILLING CODE 8025-01-P**

## SMALL BUSINESS ADMINISTRATION

### [Declaration of Economic Injury Disaster #9T74]

#### State of New York

Westchester County and the contiguous counties of Bronx, Orange, Putnam and Rockland in the State of New York; Fairfield County in Connecticut; and Bergen County in New Jersey constitute an economic injury disaster loan area due to a fire that occurred on November 7, 2002, in the City of Mount Vernon in Westchester County. Eligible small businesses and small agricultural cooperatives without credit available elsewhere may file applications for economic injury assistance as a result of this disaster until the close of business on October 3, 2003 at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 1 Office, 360 Rainbow Blvd, South, 3rd Floor, Niagara Falls, NY 14303.

The interest rate for eligible small businesses and small agricultural cooperatives is 3.324 percent.

The numbers assigned for economic injury for this disaster are 9T7400 for New York; 9T7500 for Connecticut; and 9T7600 for New Jersey.

(Catalog of Federal Domestic Assistance Program No. 59002.)

Dated: January 3, 2003.

**Hector V. Barreto,**

*Administrator.*

[FR Doc. 03-511 Filed 1-9-03; 8:45 am]

**BILLING CODE 8025-01-P**

## SMALL BUSINESS ADMINISTRATION

### [Declaration of Disaster #P002]

#### State of North Carolina (Amendment #1)

In accordance with a notice received from the Federal Emergency Management Agency, dated December 20, 2002, the above numbered declaration is hereby amended to include Caldwell, Davie, Edgecombe, Johnston, Northampton, Polk, Warren, Wayne and Wilson Counties in the State of North Carolina as disaster areas due to damages caused by a severe ice storm occurring from December 4, 2002, and continuing through December 6, 2002.

All other information remains the same, *i.e.*, the deadline for filing applications for physical damage is February 10, 2003.

(Catalog of Federal Domestic Assistance Program Nos. 59008.)

Dated: December 31, 2002.

**S. George Camp,**

*Acting Associate Administrator for Disaster Assistance.*

[FR Doc. 03-510 Filed 1-9-03; 8:45 am]

**BILLING CODE 8025-01-P**

## SMALL BUSINESS ADMINISTRATION

### [Declaration of Disaster #3479]

#### Commonwealth of the Northern Mariana Islands (Amendment #1)

In accordance with information received from the Federal Emergency Management Agency dated December 16, 2002, the above-numbered declaration is hereby amended to establish the incident period as beginning on December 8, 2002 and continuing through December 16, 2002.

All other information remains the same, *i.e.*, the deadline for filing applications for physical damage is February 24, 2003, and for economic injury the deadline is September 24, 2003.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: December 31, 2002.

**S. George Camp,**

*Acting Associate Administrator for Disaster Assistance.*

[FR Doc. 03-509 Filed 1-9-03; 8:45 am]

**BILLING CODE 8025-01-P**

<sup>18</sup> 17 CFR 200.30-3(a)(12).