

name, absent instruction from the beneficial holder of the shares, on any proposal to obtain shareholder approval required by the 1940 Act of an investment advisory contract between an investment company and a new investment adviser due to an assignment of the investment company's investment advisory contract, including an assignment caused by a change in control of the investment adviser that is party to the assigned contract.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements under Section 6(b)(5) of the Act<sup>8</sup> that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>9</sup> and paragraph (f)(1) of Rule 19b-4 thereunder<sup>10</sup> as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing Exchange rule. 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.<sup>11</sup>

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

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(1).

<sup>11</sup> The effective date of the original proposed rule change is September 2, 2005 and the effective date of Amendment No. 2 is September 28, 2005. For

## 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. Comments may be submitted by any of the following methods:

### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2005-61 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303. All submissions should refer to File Number SR-NYSE-2005-61. 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, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2005-61 and should be submitted on or before November 4, 2005.

purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change, as amended, under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on September 28, 2005, the date on which the Exchange submitted Amendment No. 2. See 15 U.S.C. 78s(b)(3)(C).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

J. Lynn Taylor,

Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52579; File No. SR-NYSE-2004-73]

### Self-Regulatory Organizations; New York Stock Exchange, Inc., Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 Thereto To Amend NYSE Rule 440A Relating to Telephone Solicitation

October 7, 2005.

On December 30, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 ("Exchange Act"),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> a proposed amendment to NYSE Rule 440A relating to telephone solicitation. On July 1, 2005, the NYSE filed Amendment No. 1 to the proposed rule change.<sup>4</sup> On August 11, 2005, the NYSE filed Amendment No. 2 to the proposed rule change.<sup>5</sup> The proposed rule change, as amended, was published for comment in the **Federal Register** on August 25, 2005.<sup>6</sup> The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

NYSE Rule 440A currently provides that no member, allied member or employee of a member or member organization shall make an outbound telephone call to the residence of any person for the purpose of soliciting the purchase of securities or related services at any time other than between 8 a.m. and 9 p.m. local time at the called person's location without the prior consent of the person; or make an outbound telephone call to any person for the purpose of soliciting the

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

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

<sup>2</sup> 15 U.S.C. 78a et seq.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> In Amendment No. 1, the NYSE proposed to partially amend the text of proposed amended Rule 440A and made conforming and technical changes to the original filing.

<sup>5</sup> In Amendment No. 2, the NYSE proposed additional changes to the text of proposed amended Rule 440A and made additional changes to the original filing.

<sup>6</sup> See Securities Exchange Act Release No. 52308 (August 19, 2005), 70 FR 49961 (August 25, 2005).

purchase of securities or related services without disclosing promptly and in a clear and conspicuous manner to the called person the following information: (1) The identity of the caller and the member or member organization; (2) the telephone number or address at which the caller may be contacted; and (3) that the purpose of the call is to solicit the purchase of securities or related services.

The proposed amendment to NYSE Rule 440A would incorporate regulations issued by the Federal Communications Commission ("FCC") and the Federal Trade Commission relating to the implementation of the national do-not-call registry and the amendments to the Telephone Consumer Protection Act of 1991 ("TCPA").<sup>7</sup> The amendment would delete current Rule 440A and replace it with new language that incorporates the requirements of the FCC regulation, which is applicable to broker-dealers, but retain those sections of current Rule 440A that remain relevant. The proposed amended rule would generally prohibit NYSE members, allied members, and employees of members and member organizations from making telemarketing calls to people who have registered on the national do-not-call registry, while retaining time-of-day and firm-specific do-not-call restrictions similar to those contained in the current rule.

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>8</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,<sup>9</sup> of the Exchange Act. Section 6(b)(5) requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market

<sup>7</sup> Rules and Regulations Implementing the TCPA, FCC 03-153, adopted June 26, 2003, 68 FR 44144 (July 25, 2003). The FCC rules address such diverse topics as abandoned calls and calls made on behalf of tax exempt non-profit organizations. The NYSE's proposed amendment does not contain these provisions as such matters generally fall outside the purview of the investor protection concerns underlying the proposed rule change. Nevertheless, members and member organizations are subject to the FCC national do-not-call rules and must therefore, comply with those provisions or risk action by the FCC.

<sup>8</sup> In approving this proposed rule change, the Commission has considered whether the proposed rule change will promote efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

and national market system, and in general, to protect investors and the public interest. The Commission believes that the proposed rule change, as amended, is designed to accomplish these ends by requiring NYSE members, allied members, and employees of members and member organizations to observe time-of-day restrictions on telephone solicitations, maintain firm-specific do-not-call lists, and refrain from initiating telephone solicitations to investors and other members of the public who have registered their telephone numbers on the national do-not-call registry. The Commission also believes that the proposed rule change, as amended, establishes adequate procedures to prevent NYSE members, allied members, and employees of members and member organizations from making telephone solicitations to do-not-call registrants, which should have the effect of protecting investors by enabling persons who do not want to receive telephone solicitations from members or member organizations to receive the protections of the national do-not-call registry, while providing appropriate exceptions to the rule's restrictions, which should promote just and equitable principles of trade.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change (SR-NYSE-2004-73), as amended, be and is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52568; File No. SR-Phlx-2005-58]

### Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment No. 1 Thereto Relating to Its October 2005 Equity Options Payment for Order Flow Program

October 6, 2005.

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>

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</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.

notice is hereby given that on September 29, 2005, 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, II, and III below, which Items have been prepared by the Exchange. On October 3, 2005, the Phlx submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> The Phlx has designated this proposal as one changing a fee imposed by the Phlx under Section 19(b)(3)(A)(ii) of the Act<sup>4</sup> and Rule 19b-4(f)(2) thereunder,<sup>5</sup> which renders the proposal, as amended, effective upon filing with the Commission. 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 its equity options payment for order flow program in a number of ways, as described in detail below.

#### A. Equity Option Payment for Order Flow Program Prior to October 1, 2005

Pursuant to the Exchange's payment for order flow program in effect for transactions settling on or after July 1, 2005,<sup>6</sup> only orders that are delivered electronically, over AUTOM, are assessed a payment for order flow fee to a Registered Options Trader ("ROT") or

<sup>3</sup> In Amendment No. 1, the Exchange revised the proposed text to correct typographical errors contained in the proposed Schedule of Fees and to reflect that options on the Nasdaq-100 Index Tracking Stock<sup>SM</sup> are now traded under the symbol "QQQQ."

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>5</sup> 17 CFR 240.19b-4(f)(2).

<sup>6</sup> The program that took effect on July 1, 2005 is a pilot program that is scheduled to expire on May 27, 2006, the same date the one-year pilot program in connection with Directed Orders is due to expire. See Securities Exchange Act Release Nos. 51759 (May 27, 2005), 70 FR 32860 (June 6, 2005) (SR-Phlx-2004-91) and 52114 (July 22, 2005), 70 FR 44138 (August 1, 2005) (SR-Phlx-2004-44).