VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[97] that the proposed rule change (File No. SR–NYSEArca–2006–59), as amended by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[98]

Nancy M. Morris,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54538; File No. SR–Phlx–2006–43]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Approving a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 3 Thereto Relating to the Exchange's New Equity Trading System, XLE

September 28, 2006.

I. Introduction

On July 13, 2006, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("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 amend its rules to implement a new trading model for equity securities that provides the opportunity for automated executions to occur within a central matching system accessible by Exchange members and member organizations and their Sponsored Participants, as defined below. On August 14, 2006, the Exchange filed Amendment No. 1 to the proposed rule change. On August 16, 2006, the Exchange filed Amendment No. 2 to the proposed rule change. The proposed rule change, as amended, was published for comment in the **Federal Register** on August 25, 2006.[3] The Commission received two comment letters on the proposal, as amended.[4] On

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[97] *Id.*

[98] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 54329 (August 17, 2006), 71 FR 50482 (August 25, 2006) ("Notice").

[4] *See* Letter from Joseph D. Carapico, PennMont Securities to C. Robert Paul, Chief Counsel, Phlx,

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September 22, 2006, the Exchange filed Amendment No. 3 to the proposed rule change.[5]

This order approves the proposed rule change as amended by Amendment Nos. 1 and 2. Simultaneously, the Commission is providing notice of filing of Amendment No. 3 and is granting accelerated approval of Amendment No. 3.

II. Description

The Exchange proposes to amend its rules to implement a new market structure and trading model for equity securities. Specifically, the Exchange proposes to adopt a fully-automated equities trading system, referred to as "XLE," through which automated executions will occur within a central matching system. With the introduction of this new automated, order-driven system, the Exchange no longer will continue to operate a physical equities trading floor, nor will it operate its automated Philadelphia Stock Exchange Automated Communication and Execution ("PACE") System through which Phlx member organizations currently can send orders to the Exchange electronically.[6]

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dated September 5, 2006; and Letter from Joseph D. Carapico, PennMont Securities to C. Robert Paul, Chief Counsel, Phlx, dated September 13, 2006 ("Second PennMont Letter"). *See also* Letter from C. Robert Paul, Executive Vice President and General Counsel, Phlx, to Nancy M. Morris, Secretary, Commission, dated September 20, 2006 (responding to the two comment letters) ("Phlx Response Letter").

[5] The text of Amendment No. 3 is available on Phlx's Web site (*http://www.phlx.com*), at the principal office of Phlx, and at the Commission's Public Reference Room. In Amendment No. 3, the Exchange made several technical, non-substantive changes to the proposed rule text. In addition, the Exchange added text to proposed Phlx Rule 188 regarding trade identifiers; relocated the self-help provision from proposed Phlx Rule 1(cc) to proposed Phlx Rule 185(h); added text to proposed Phlx Rule 185(b)(3) to clarify the operation of Pegged Orders; and amended the terminology in proposed Phlx Rule 163 from "Exchange Official" to "Equity Exchange Official." Further, the Exchange proposes to allow floor members and member organizations who become XLE participants to remain in their current space on the Exchange's floor, paying the applicable space rental fees, for a short time while they transition to XLE. The Exchange also announced its intent to request relief from the applicable provisions of the ITS Plan to allow the Exchange to implement ISO Orders and IOC Cross Orders marked ISO, as well as orders marked "Benchmark," before the February 5, 2007 "Trading Phase Date" for Regulation NMS (*i.e.*, the operative date for Regulation NMS-compliant systems that intend to qualify their quotations for trade-through protection under Rule 611 of Regulation NMS during the Pilot Stocks Phase and All Stocks Phase).

[6] Since the Exchange proposes to operate XLE in lieu of trading on its physical equities trading floor, in addition to proposing new and amended rules to implement XLE, the Exchange also proposes to modify or delete several Phlx By-laws and various Phlx Rules that relate to floor trading. The Exchange

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XLE will accept orders in NMS Stocks [7] that are traded on the Exchange (which, as proposed, will include Nasdaq-listed securities) [8] from Exchange members and member organizations, and their Sponsored Participants and their Participant Authorized Users (collectively, "XLE Participants") and will display, route, and execute those orders automatically pursuant to non-discretionary algorithms codified in the proposed Phlx Rules. Orders will be ranked on XLE in price-time priority regardless of the identity of the entering XLE Participant, and executions will occur automatically and immediately upon order entry if trading interest is available on the system. The Exchange also will provide an optional routing service for those orders eligible for routing for which trading interest is not present on XLE.[9]

With its new equities trading platform, the Exchange no longer will accommodate equity specialists. However, the Exchange proposes to allow its member organizations to register as Market Makers [10] on XLE, and those Market Makers could then choose to register in one or more securities that are traded on XLE. Since Market Maker registration will be optional, an NMS Stock may trade on XLE without a Market Maker. Once registered in a particular security, a Market Maker will be required to maintain continuous Limit Orders on both sides of the market in that security during the Core Session

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also proposes to delete various outdated Phlx Rules that relate, for example, to the delivery and settlement of securities. The Commission notes that upon approval, unless otherwise specified, the proposed rule changes will be effective, but not operative, until the Exchange discontinues its physical equities trading floor and commences operation of XLE, as described in Section II.

[7] *See* proposed Phlx Rule 1(t). *See also* 17 CFR 242.600(b)(47). The term "NMS Stock" means any NMS security other than an option. "NMS security" is defined in Rule 600(b)(46) of Regulation NMS under the Act to mean any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan. *See* 17 CFR 242.600(b)(46).

[8] Unlike its current equities floor, where Phlx does not trade Nasdaq-listed securities, the Exchange proposes to allow XLE to trade Nasdaq-listed securities, in addition to securities listed on other national securities exchanges, pursuant to unlisted trading privileges.

[9] The Routing Agreement will allow the routing broker-dealer to act for the XLE Participant if the XLE Participant or its Sponsored Participant enters an order-type that is routable. As proposed, no XLE Participant will be able to enter a Limit Order or Reserve Order *without* "Do Not Route" instructions, or a Single Sweep Order, unless the XLE Participant or the XLE Participant's Sponsoring Member Organization has entered into a Routing Agreement. *See* proposed Phlx Rule 181.

[10] *See* proposed Phlx Rule 1(l).

(normally 9:30 a.m. to 4 p.m., Philadelphia time).

The Exchange has proposed a number of provisions that are designed specifically to enable XLE to comply with Regulation NMS under the Act ("Regulation NMS")[11] including, for example, proposed Phlx Rule 186 relating to locking or crossing quotations in NMS Stocks. Further, the Exchange intends to operate XLE as an "automated trading center" for purposes of Regulation NMS and display "automated quotations" (as defined by Regulation NMS) at all times except in the event that a systems malfunction renders XLE incapable of displaying automated quotations.[12] In addition, once the February 5, 2007 Trading Phase Date for Regulation NMS has been reached, XLE will permit orders to be marked as intermarket sweep orders ("ISOs") pursuant to Regulation NMS and will also permit incoming ISOs from other trading centers.[13]

In its filing, the Exchange proposed new rules and revisions to its existing rules in order to accommodate XLE. These rules, which are examined in more detail in Section IV, below, relate to, among other things: Hours of business; order entry and execution increments; registration of market makers; obligations of market maker authorized traders; registration of market makers in a security; obligations of market makers; access; order entry; order marking; trading sessions customer disclosure; order ranking and display; orders and order execution; odd and mixed lots; trade execution and reporting; clearance and settlement and anonymity; clearly erroneous executions; trading halts; clearance and settlement; and short sales.

In particular, XLE will accept several new order types.[14] In addition to accepting market orders,[15] XLE will accept certain one-sided limit price orders that are: (1) Subject to the Quote Management Instructions ("QMI") of either "Ship and Quote"[16] or "Post Order and Participate";[17] (2) executed immediately on XLE, including Immediate-or-Cancel ("IOC") orders,[18] Single Sweep Orders ("SSO"),[19] and

ISOs;[20] and (3) designated as Pegged Orders.[21] In addition, XLE will accept certain two-sided cross orders, including Mid-Point Cross Orders,[22] IOC Cross Orders,[23] Benchmark Orders,[24] Qualified Contingent Trades,[25] and two-sided orders that are marked for "non-regular way" settlement.[26]

The Exchange intends to roll-out XLE in several phases (within each phase, the Exchange will start first with NYSE- and Amex-listed securities, then Nasdaq-listed securities), beginning with: (1) Two-sided orders only for approximately one week; (2) then one-sided orders, all of which will be deemed "Do Not Route," incoming linkage orders routed to the Exchange through the new NMS Linkage, and all Intermarket Trading System ("ITS") commitments; and finally (3) routing functionality.[27] In addition, the Exchange has stated that it may roll-out Reserve Orders later than it rolls out other one-sided orders.[28] The Exchange anticipates that the roll-out will be complete within a two month period, and it intends to publish more precise information regarding the roll-out via Exchange circular.[29]

III. Comments Received

The Commission received two comment letters from one commenter.[30] The commenter, PennMont Securities, which currently operates as an equities specialist on Phlx, objected to the Exchange's proposal to eliminate equity specialists from the new Phlx equities platform and criticized the process by which the Exchange considered its proposed rule change. In addition, the commenter contended that eliminating equity specialists would negatively affect the prospects for its business,[31] and inferred that such elimination would adversely impact specific benefits for which it currently is eligible under the Internal Revenue Code.[32] Further, the commenter opined that past cases of abuse of trading privileges on the Exchange by specialists can be addressed through increased oversight by the Exchange, rather than the

elimination of specialists.[33] Accordingly, the commenter proposed that Phlx implement a hybrid system similar to the one being implemented by the New York Stock Exchange.[34]

The Exchange submitted a response letter to the Commission addressing the commenter's concerns.[35] In particular, the Exchange noted that it complied with the By-laws of the Exchange as well as applicable securities laws and regulations in submitting its proposed rule change to the Commission on Form 19b–4.[36] The Exchange also addressed the commenter's concerns regarding the proposed discontinuance of equity specialists on the Exchange by noting that a national securities exchange is permitted, but not required, to provide for specialists on its marketplace,[37] and that the Act does not mandate a particular market structure.[38] The Exchange also noted that other national securities exchanges already operate electronic markets without specialists (*e.g.*, NYSE Arca), and several exchanges are currently proposing to adopt market structures that feature electronic platforms without specialists.[39] Finally, the Exchange opined that any effect on a member's tax status is collateral to the legality and operation of the proposed rule change.[40]

The Commission agrees with the statement in the Phlx Response Letter that the Act does not impose upon or otherwise mandate any particular market structure for a national securities exchange. While an exchange may choose to operate a market that provides for specialist participation, it also is free to propose and adopt another market structure as long as such structure and governing rules comport with the Act and the rules and regulations thereunder. In addition, the Commission notes that issues for a particular market participant that arise under the Internal Revenue Code as a result of the Exchange's proposal are outside of the Commission's jurisdiction. As noted below, the Commission believes that the Exchange's proposed XLE system and governing rules meet the requirements of the Act.

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[11] 17 CFR 242.600 *et seq.*

[12] *See* proposed Phlx Rule 160. The Exchange states that it will halt trading and therefore not display any quotations in the event of such a systems malfunction. *See* Notice, *supra* note 3, 71 FR at 50483.

[13] *See* 17 CFR 242.611(b)(5). *See also* proposed Phlx Rule 185(b)(2)(C).

[14] *See* proposed Phlx Rule 185.

[15] *See* proposed Phlx Rule 185(a).

[16] *See* proposed Phlx Rule 185(b)(1)(C)(i).

[17] *See* proposed Phlx Rule 185(b)(1)(C)(ii).

[18] *See* proposed Phlx Rule 185(b)(2)(A).

[19] *See* proposed Phlx Rule 185(b)(2)(B).

[20] *See* proposed Phlx Rule 185(b)(2)(C).

[21] *See* proposed Phlx Rule 185(b)(3).

[22] *See* proposed Phlx Rule 185(c)(1).

[23] *See* proposed Phlx Rule 185(c)(2).

[24] *See* proposed Phlx Rule 185(c)(3).

[25] *See id.*

[26] *See* proposed Phlx Rule 185(c)(4).

[27] *See* Notice, *supra* note 3, 71 FR at 50483.

[28] *See* Notice, *supra* note 3, 71 FR at 50483.

[29] *See id.*

[30] *See supra* note 4 (citing comment letters).

[31] *See* Second PennMont Letter, *supra* note 4, at 1.

[32] *See id.* at 1.

[33] *See id.* at 2.

[34] *See id.*

[35] *See* Phlx Response Letter, *supra* note 4.

[36] *See id.* at 1.

[37] *See* 15 U.S.C. 78k(b).

[38] *See* Phlx Response Letter, *supra* note 4, at 2.

[39] *See, e.g.*, Securities Exchange Act Release Nos. 54291 (August 8, 2006), 71 FR 47264 (August 16, 2006) (File No. SR–BSE–2006–30); and 54301 (August 10, 2006), 71 FR 47836 (August 18, 2006) (File No. SR–CHX–2006–05).

[40] *See* Phlx Response Letter, *supra* note 4, at 2–3.

IV. Discussion and Commission Findings

After careful review and consideration of the comments, the Commission finds, for the reasons discussed more fully below, that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange [41] and, in particular, the requirements of section 6 of the Act [42] and the rules and regulations thereunder. The Commission finds that the proposed rule change, as amended, is consistent with section 6(b)(5) of the Act [43] in that it is 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.

In addition, the Commission finds that the proposal is consistent with section 11A [44] of the Act in general, and furthers the objectives of section 11A(a)(1)(C) of the Act,[45] in particular, including: (1) The economically efficient execution of securities transactions; (2) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets; (3) the availability to brokers, dealers, and investors of information with respects to quotations for and transactions in securities; (4) the practicability of brokers executing investors' orders in the best market; and (5) an opportunity for investors' orders to be executed without the participant of a dealer.

The discussion below addresses more fully the Exchange's proposal to replace its current equities trading model with a new electronic trading system that will provide for price-time priority executions and to adopt new rules and revisions to its existing rules in connection with its proposed new market structure.

A. Order Types

XLE will accept several order types from XLE Participants. Specifically, XLE will accept the following order types: Market Orders, Limited Priced Orders (including Limit Orders, Reserve Orders, IOC Orders, SSO Orders, ISO Orders, and Pegged Orders), and Two-Sided Orders (including Mid-Point Cross Orders, IOC Cross Orders, Non-Regular Way Cross Orders, and IOC Cross Orders marked "Benchmark" or "Qualified Contingent Trade"). Existing orders on XLE will be ranked according to price-time priority. An existing order's displayable price will be determined by XLE based on its limit price or pegging instructions, its routability and QMI, and its short sale status.

1. Market Orders

A Market Order on XLE is an order to buy or sell a stated amount of a security that is to be executed immediately and automatically against existing orders on XLE up to and including the price of the best away Protected Quotation.[46] Any unexecuted shares of a Market Order will be automatically cancelled. Further, XLE will cancel a Market Order when the market is crossed (*i.e.*, when the Protected Bid is priced higher than the Protected Offer). In other words, a Market Order on XLE is executable only on XLE and is designed not to trade-through the best away Protected Quotation.

2. Limited Price Orders

XLE also is designed to accept a number of limited price orders, including: (1) Limited price orders subject to QMI; (2) limited price orders executed immediately on XLE; and (3) Pegged Orders. XLE Participants will be able to designate during which contiguous XLE trading session(s) their limited price orders will be eligible for execution.

Limit and Reserve Orders. Limit Orders are one-sided orders to buy or sell a stated amount of a security at a specified price or better.[47] Reserve Orders are one-sided orders to buy or sell a stated amount of a security at a specified price or better with at least a round lot portion of the size that is displayable and with at least a round lot portion of the size that is not displayable by XLE, provided that the portion of the Reserve Order that is not displayable shall have the same price as the portion that is displayable.[48] Limit Orders and Reserve Orders will be routable unless otherwise marked by a XLE Participant.[49]

IOC Orders. IOC Orders will be executed immediately and automatically against existing orders on XLE up to and including the price of the best away Protected Quotation, unless the market is crossed (*i.e.*, the Protected Bid is priced higher than the Protected Offer), in which case XLE will ignore away Protected Quotations.[50] IOC Orders will not be eligible for routing to another market center. Accordingly, the portion of an IOC Order that does not get executed on XLE will be immediately and automatically cancelled. Any XLE Participant may use an IOC Order to immediately and automatically execute against the full size of the displayed quotation on XLE (including any undisplayed or reserve size available at the price of the displayed quotation). As with all executions on XLE, XLE will immediately and automatically transmit a response to the XLE Participant who sent the IOC Order indicating the action taken with respect to the IOC Order. Additionally, XLE will immediately and automatically update its bid/offer as a result of the execution.

SSOs. SSOs are executed immediately and automatically against existing orders on XLE and/or away Protected Quotations, up to and including the order's limit price.[51] Any shares of the SSO that are not immediately executed on XLE or on an away market will be cancelled.

ISOs. ISOs are executed immediately and automatically against existing orders on XLE at their displayable price, and the shares of the ISO not so executed will be cancelled.[52] An ISO will be executed on XLE without regard to any away Protected Quotations.

Pegged Orders. Pegged Orders are round lot or mixed lot limited price orders to buy or sell, only on XLE, a stated amount of a security at a display price set to track (up, down, or at) the current best Protected Bids or Offers on either side of the market in an amount specified by the XLE Participant in an increment permitted by proposed Phlx Rule 125.[53] A Pegged Order must

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[41] The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[42] 15 U.S.C. 78f.

[43] 15 U.S.C. 78f(b)(5).

[44] 15 U.S.C. 78k–1.

[45] 15 U.S.C. 78k–1(a)(1)(C).

[46] *See* proposed Phlx Rule 185(a). *See also* proposed Phlx Rule 1(cc) (defining Protected Bid, Offer or Quotation).

[47] *See* proposed Phlx Rule 185(b)(1)(A).

[48] *See* proposed Phlx Rule 185(b)(1)(B).

[49] *See* proposed Phlx Rule 185(b)(1)(A), (B), and (C).

[50] *See* proposed Phlx Rule 185(b)(2)(A).

[51] *See* proposed Phlx Rule 185(b)(2)(B).

[52] *See* proposed Phlx Rule 185(b)(2)(C). The Exchange intends that the ISO Order be equivalent to the intermarket sweep order defined in Rule 600(b)(30) of Regulation NMS. 17 CFR 242.600(b)(30). XLE Participants entering an ISO must ensure that the ISO meets the requirements of Rule 600(b)(30) of Regulation NMS. 17 CFR 242.600(b)(30). *See also* Notice, *supra* note 3, 71 FR at 50485 (note 62).

[53] *See* proposed Phlx Rule 185(b)(3). The display price will not be permitted to lock or cross the market in a manner that would violate proposed Phlx Rule 186. *See id. See also* Amendment No. 3, *supra* note 5 (clarifying the definition of Pegged Order).

consist of at least a round lot portion that is displayable and may include at least a round lot portion that is not displayable by XLE, provided that the portion of the Pegged Order that is not displayable shall have the same price as the portion that is displayable .

3. Two-Sided Orders

XLE will accept several types of two-sided cross orders, including Mid-Point Cross Orders and IOC Cross Orders. Two-sided orders involve instructions to match immediately and automatically on XLE an identified buy-side order with an identified sell-side order.[54] Mid-Point Cross Orders are two-sided orders that execute, in their entirety, at the midpoint of the Protected National Best Bid/Offer (''NBBO''), unless the Protected Bid is higher than the Protected Offer, in which case the Mid-Point Cross Order will be cancelled.[55] The execution process for two-sided orders and the circumstances under which XLE will cancel a Mid-Point Cross Order (when the Protected NBBO is locked) or an IOC Cross Order are discussed below in Section IV.C.

XLE also will accept two-sided cross orders for ''non-regular way settlement.'' [56] A non-regular way cross is a two-sided order that, if marked for non-regular way settlement, may execute at any price, without regard to the Protected NBBO or any other orders on XLE, provided that Mid-Point Cross Orders marked for non-regular way settlement will be cancelled when the Protected Bid is priced higher than the Protected Offer.

The Commission finds that the Exchange's proposed rules relating to order types are designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and are not designed to permit unfair discrimination between customers, brokers, or dealers. In particular, the Commission believes that the Exchange's proposed SSO and ISO orders are designed, among other things, to meet the requirements of Regulation NMS, and to perfect the mechanism of a free and open market and a national market system and to protect investors and the public interest, and thus, are consistent with the requirements of the Act. In addition, the Commission believes that the proposed XLE order types are designed to provide investors with flexibility in the display and execution of their orders, while still

ensuring that customer priority principles are upheld. Further, the proposed features of XLE are designed to allow new opportunities for orders to interact, thereby promoting efficiency of executions.

B. Order Delivery, Display, and Interaction

Trading Sessions. As proposed, XLE will be open to accept orders for three different trading sessions beginning at 8 a.m. Eastern time and continuing until 6 p.m., except during trading halts, every trading day unless otherwise declared by the Exchange.[57] The Pre Market Session will begin at 8 a.m., and will run until the start of the Core Session, typically at 9:30 a.m. The Core Session, which will end at 4 p.m., will be XLE's ''regular trading hours,'' as defined in Rule 600(b)(64) of Regulation NMS.[58] The Post Market Session will run from the end of the Core Session until 6 p.m. XLE Participants may designate during which contiguous XLE trading session(s) a Limit, Reserve, or Pegged Order is eligible for execution.[59]

Since XLE will not feature any opening or closing auctions or rotations at the beginning of, during, or at the end of any of these sessions, XLE will only accept orders when it is open for trading and can immediately process those orders for execution, routing, or display, as applicable. At the end of the trading day, and in the event of an intraday trading halt, XLE will cancel all existing orders so that when trading begins again, either the next day or after the halt is lifted, there are no existing orders that could impermissibly lock or cross the market. The Commission believes that the proposed rule regarding trading sessions is reasonable and consistent with the Act. In particular, the Commission notes that a XLE Participant will be required to disclose the risks of pre-market and post-market session trading to its customers, and that existing orders in XLE will be cancelled when trading stops so as to not lock or cross the market when trading resumes.

Access to XLE and Order Delivery. Phlx has proposed that all XLE

[57] *See* proposed Phlx Rule 101.
[58] 17 CFR 242.600(b)(64).
[59] *See* proposed Phlx Rule 185(b)(1)(A)–(B) and (b)(3). Before accepting an order from a non-XLE Participant for execution in the Pre Market or Post Market Session, a XLE Participant will be required to make certain risk disclosures to the non-XLE Participant. *See* proposed Phlx Rule 183. The disclosure notes, among other things, that trading outside of ''regular'' trading hours may involve material trading risks, including the possibility of lower liquidity, high volatility, changing prices, unlinked markets, an exaggerated effect from news announcements, wider spreads and any other relevant risk.

Participants be able to access XLE through an Exchange electronic interface by means of their own communication lines or through lines established by service providers in the business of maintaining connectivity in the securities marketplace. In addition, XLE Participants may access XLE for the entry of two-sided orders through technology provided by the Exchange. Finally, to the extent that the Exchange participates in the ITS Plan or any other linkage plan for NMS Stocks, ITS commitments and other intermarket orders can be sent to XLE through these linkages. The Commission believes that the Exchange's proposed means for providing connectivity to XLE are reasonable and consistent with the Act.

Under proposed Phlx Rule 181, XLE Participants will be allowed to enter any type of order available on XLE provided, however, that no XLE Participant may enter a Limit Order or Reserve Order without ''Do Not Route'' instructions, or an SSO, unless the XLE Participant or the XLE Participant's Sponsoring Member Organization has entered into a Routing Agreement.[60] The Routing Agreement between the Exchange, the Exchange's routing broker-dealer and the XLE Participant or the XLE Participant's Sponsoring Member Organization will allow the routing broker-dealer to act for the XLE Participant if the XLE Participant or its Sponsored Participant enters an order that is routable. The Commission believes that Phlx's proposed Rule 181 is appropriate and consistent with the Act.

Order Display. XLE will be an order-driven system where automated executions in NMS Stocks can occur within a centralized matching system without the participation of a specialist. Orders, or portions thereof, that are not immediately matched, routed to another market center, or cancelled, will be eligible for posting on XLE. Once displayed on XLE, such orders will be eligible to be executed against any incoming orders.

The Exchange has proposed two levels of order display. The first level, which will be provided to the appropriate market data reporting plans for dissemination, will include the best-ranked displayed orders to buy and sell on XLE, as well as the aggregated size of those orders (*i.e.*, the top of the XLE book). The second level of display, which will be available to any person subject to the payment of any applicable fees, will feature a depth-of-book feed displaying all orders on XLE, except for the undisplayed reserve portions of

[54] *See* proposed Phlx Rule 185(c).
[55] *See* proposed Phlx Rule 185(c)(1).
[56] *See* proposed Rule 185(c)(4).

[60] *See* proposed Phlx Rule 181.

Reserve Orders. All orders will be displayed on an anonymous basis.[61] The Commission believes that the proposed rules regarding order display on XLE are reasonable and consistent with the Act and are designed to provide investors with timely and accurate information regarding trading interest on XLE.

Locked and Crossed Markets. In most cases, XLE will not accept and display an order that would lock or cross an away Protected Quotation disseminated pursuant to an effective national market system plan (*i.e.,* an order that would improperly lock or cross the ITS best bid or offer, or, upon the February 5, 2007 Trading Phase Date for Regulation NMS, if display of the order would constitute a locking or crossing quotation). Further, consistent with Regulation NMS, the Exchange has proposed a rule that will require its members to reasonably avoid displaying quotations that would lock or cross a Protected Quotation (unless an applicable exemption applies), and also will prohibit members from engaging in a pattern or practice of displaying any such quotations.[62] Pursuant to proposed Phlx Rule 186, XLE will be allowed to lock or cross an away Protected Quotation, however, when the market is crossed. Additionally, XLE will be allowed to lock or cross an away Protected Quotation if XLE first routes an order to that away Protected Quotation (and all better-priced quotations) for the full displayed size. Finally, when the market is locked, and XLE is disseminating an order equal to either the best Protected Bid or best Protected Offer, then XLE may continue to display new orders at the same price of the order that it is disseminating. The Exchange has requested that its proposed Rule 186 not become effective until the February 5, 2007 Trading Phase Date for Regulation NMS.[63]

The Commission believes that the proposed rule regarding locking and crossing the market is appropriate and consistent with the Act and the requirements of Regulation NMS. Further, the Commission believes that delaying the operative date of proposed Phlx Rule 186 will allow the Exchange and its members to coordinate their compliance with the requirements of Rule 610 of Regulation NMS, while ensuring that the Exchange complies with the applicable ITS requirements so long as they remain in effect.

Order Protection. The Exchange states that it has designed its XLE system,

including proposed Phlx Rule 185, to prevent trade-throughs of Protected Quotations.[64] In addition, XLE will make outbound routing available for those orders that are required to be routed.[65]

The Exchange also intends to take advantage of certain exceptions to Rule 611 of Regulation NMS, including the ''self-help'' exception.[66] In addition, Phlx has proposed that the following orders be allowed to trade-through an away Protected Quotation: (1) Two-sided orders for non-regular way settlement;[67] (2) when a Protected Bid is priced higher than a Protected Offer, Limit, Reserve, IOC, and IOC Cross Orders;[68] (3) incoming ISO orders;[69] (4) IOC Cross Orders that are marked as ''Benchmark'';[70] (5) IOC Cross Orders that are marked as ''Qualified Contingent Trades'';[71] and (6) orders that are accompanied by the simultaneous routing of an intermarket sweep order to execute against the full displayed size of that Protected Quotation.[72] The Commission believes that the proposed Phlx Rules governing order protection on XLE, including proposed Phlx Rule 185, are appropriate and consistent with the Act and the requirements of Regulation NMS.

Trading Halts. In addition to current Phlx rules governing the halting of trading,[73] proposed Phlx Rule 164(a) will allow the Chairman and Chief Executive Officer of the Exchange or his designee to suspend trading, for a period of no longer than two days (unless extended by the Exchange's Board of Governors), in any and all securities traded on XLE whenever in his or his designee's opinion such suspension would be in the public interest. If trading in one or more securities is halted, all orders in those securities will be cancelled and XLE will not accept any new orders until

trading resumes.[74] The Commission believes that the proposed trade halt rule is consistent with the Act, including the protection of investors and the public interest.

Clearly Erroneous Executions. The Exchange's proposed Rule 163 governing clearly erroneous executions will allow the Exchange to review a transaction when there is an obvious error in any term, such as price, number of shares or other unit of trading, or identification of the security.[75] The proposed rule sets forth formal procedures for use by XLE Participants in requesting a review of a transaction, as well as the procedures governing the Exchange's review of such transactions and specific means for market participants to appeal decisions made by an Exchange Official. In addition, the Exchange Official may, on his or her own motion, review transactions on XLE that arose during any disruption or malfunction in the use or operation of any electronic communications or trading facilities of the Phlx, or extraordinary market conditions or other circumstances in which the nullification or modification of transactions may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest.[76] In addition, XLE will contain a mechanism to prevent the entry of potentially erroneous orders. Proposed Phlx Rule 185(d) specifies that XLE will reject an order if its price would cross the best Protected Bid or Offer by 20% or more.[77] The Commission believes that proposed Phlx Rule 163 is consistent with the Act and provides for a fair, transparent, and reasonable process in which XLE Participants can seek correction of clearly erroneous transactions. The Commission believes that proposed Phlx Rule 185 is consistent with the Act, and the Commission notes that this proposed rule is similar to the rule of another exchange that was approved by the Commission.[78]

Short Sales. To allow XLE to treat sale orders properly under Rule 10a–1 under the Act,[79] XLE Participants will be

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[61] *See infra* Section IV.G. (Anonymity).

[62] *See* proposed Phlx Rule 186(b) and (d).

[63] *See* Notice, *supra* note 3, 71 FR at 50489.

[64] *See* Notice, *supra* note 3, 71 FR at 50489.

[65] *See* proposed Phlx Rule 185(g).

[66] *See infra* Section IV.J. (Compliance with Regulation NMS and Transition to XLE).

[67] *See* proposed Phlx Rule 185(c)(4).

[68] *See* 17 CFR 242.611(b)(4). *See also* proposed Phlx Rules 185(b)(1)(A), (b)(1)(B), (b)(2)(A), and (c)(2), respectively.

[69] *See* 17 CFR 242.611(b)(5). *See also* proposed Phlx Rule 185(b)(2)(C).

[70] *See* 17 CFR 242.611(b)(7). *See also* proposed Phlx Rule 185(c)(3).

[71] *See* proposed Phlx Rule 185(c)(3). *See also* Securities Exchange Act Release No. 54389 (August 31, 2006), 71 FR 52829 (September 7, 2006) (order granting an exemption for Qualified Contingent Trades from Rule 611(a) of Regulation NMS).

[72] *See* 17 CFR 242.600(b)(30) and 17 CFR 242.611(b)(6).

[73] See, *e.g.,* Phlx Rules 133 (Trading Halts Due to Extraordinary Market Volatility) and 136 (Trading Halts in Certain Exchange Traded Funds).

[74] *See* proposed Phlx Rule 164(b).

[75] *See* proposed Phlx Rule 163.

[76] *See* proposed Phlx Rule 163(d).

[77] In the case of an order priced under $1.00, XLE will reject such order if it crosses the best Protected Bid or Offer by $0.20 or more. *See* proposed Phlx Rule 185(d).

[78] *See* Securities Exchange Act Release No. 53233 (February 6, 2006), 71 FR 7100 (February 10, 2006) (File No. SR–NASD–2006–019) (notice of filing and immediate effectiveness of proposed rule change to establish Nasdaq's uniform warning and rejection parameters for orders that cross the best bid/offer).

[79] 17 CFR 240.10a–1.

required to mark all sell orders (and the sell side of a two-sided order) with the proper designation of ''long,'' ''short,'' or ''short-exempt'' pursuant to Rule 200(g) of Regulation SHO.[80] Specifically, XLE will not effect a sell order or sale of any security, except Nasdaq Global Market and Nasdaq Capital Market securities, unless such sell order or sale is effected in compliance with Rule 10a–1. XLE can, however, effect sell orders and sales of all Nasdaq securities without regard to any short sale price test.[81] The Commission believes that the Exchange's proposed rule governing short sales, including the order marking requirement, is consistent with the Act and conforms to the requirements of Regulation SHO.

C. Priority of Orders and Order Execution

Proposed Phlx Rules 184 and 185 set forth the priority and execution parameters of XLE. Each incoming order, except certain two-sided orders, will execute against existing orders on XLE at the existing order's displayable price, in sequence of the existing order's ranking, unless it is routed away for execution.[82] An existing order's displayable price will be determined by XLE based on the order's limit price or pegging instructions, its routability and QMI (described below), and its short sale status.[83]

XLE will rank orders on a price-time basis, first by price and then by time.[84] Within each price level, Limit Orders, the displayed portion of Reserve Orders, and Pegged Orders will be ranked based on: (1) The time the order is received, and, if applicable, (2) the time its price is updated. With respect to Reserve Orders, the time priority of the displayed portion of these orders is updated when the displayed portion is refreshed with shares from the undisplayed reserve portion (which occurs when the displayed portion is reduced below a round lot).[85] As proposed, XLE will rank odd-lot and mixed-lot orders in the same manner as round-lot orders. Accordingly, all incoming orders, except for two-sided orders and ITS commitments,[86] will be eligible for execution against existing orders on XLE regardless of the order size of the existing orders.

As discussed above, proposed Phlx Rule 185 sets forth the various order types that will be accepted by XLE. The proposed order execution parameters of the various order types are discussed below.[87]

1. One-Sided Orders

Market Orders. Market Orders will be executed immediately and automatically against existing orders on XLE at their displayable price up to and including the price of the best away Protected Quotation. Any unexecuted shares of a Market Order will be automatically cancelled. Further, XLE will cancel Market Orders if the Protected NBBO is crossed (*i.e.*, when the Protected Bid is priced higher than the Protected Offer).

Limited Price Orders. XLE also is designed to accept a number of limited price orders, including: (1) Limited price orders subject to QMI; (2) limited price orders to be executed immediately on XLE; and (3) Pegged Orders. XLE Participants will be able to designate during which contiguous XLE trading session(s) their limited price orders will be eligible for execution.

Limited Price Orders Subject to QMI. XLE Participants that enter Limit Orders[88] and Reserve Orders[89] will be able to choose from certain QMI. The following QMI will be available to XLE Participants: (1) ''Ship and Quote''; and (2) ''Post Order and Participate'' (''POP''). Pursuant to a Ship and Quote instruction, XLE will execute immediately and automatically against existing orders in XLE at their displayable price, and route IOC ISO orders to any away Protected Quotations, up to and including the order's limit price.[90] Any remaining shares will be displayable on XLE at the order's limit price.

Pursuant to a POP instruction, XLE will execute immediately and automatically against existing orders in XLE at their displayable price up to and including the price of the best away Protected Quotation, and route IOC ISO orders to the best away Protected Quotations. After XLE receives responses from away markets, XLE will continue to route IOC ISO orders to away orders priced at the best away Protected Quotation until the incoming order is fully executed or its limit price is reached. Further, while it is routing IOC ISO orders, XLE also will display any unexecuted and unrouted shares of the incoming order on XLE at $.01 away from the best Protected Offer (in the case of an incoming order to buy) or Bid (in the case of an incoming order to sell).[91]

Limited Price Orders Subject to Immediate Execution. Limit Orders and Reserve Orders may be marked ''Do Not Route,'' in which case they will be immediately and automatically executed against existing orders on XLE at their displayable price up to and including the price of the best away Protected Quotation, with any remainder displayable as a bid (offer) on XLE, in the case of a buy (sell) order, at $.01 away from the best Protected Offer (Bid).[92] Unless marked as ''Do Not Route,'' XLE will route the order, if marketable, to another market center.

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[80] 17 CFR 242.200(g).

[81] *See* proposed Phlx Rule 455.

[82] Executions occurring as a result of orders matched on XLE will be reported by the Exchange to an appropriate consolidated transaction reporting system. The Exchange will promptly notify XLE Participants of all executions as soon as such executions have taken place. *See* proposed Phlx Rule 188.

[83] *See* proposed Phlx Rule 185(b)(1)(C)–(E), (b)(3), and (e)–(f).

[84] *See* proposed Phlx Rule 184(a).

[85] *See* proposed Phlx Rule 184(a)(1). The undisplayed portion of a Reserve Order is ranked based upon the time the order is received or its price is updated. *See* proposed Phlx Rule 184(a)(2).

[86] Because ITS does not accept orders in share amounts other than round lots and multiple round lots, XLE will not match odd lot orders or odd lot portions of mixed lot orders on XLE against an incoming ITS commitment.

[87] Section 11(a) of the Act, 15 U.S.C. 78k(a), prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion, unless an exception applies. Rule 11a2–2(T) under the Act, 17 CFR 240.11a2–2(T), known as the ''effect versus execute'' rule, provides exchange members with an exemption from the Section 11(a) prohibition. The Exchange intends to submit a letter to the Commission, before trading commences on XLE, representing that transactions effected in the XLE system meet the requirements of Rule 11a2–2(T). *See* Telephone call between Richard Holley III, Special Counsel, Division of Market Regulation, Commission, and John Dayton, Director and Counsel, Phlx, on September 26, 2006.

[88] *See* proposed Phlx Rule 185(b)(1)(A).

[89] *See* proposed Phlx Rule 185(b)(1)(B).

[90] *See* proposed Phlx Rule 185(b)(1)(C)(i). If an order with Ship and Quote instructions arrives while the market is crossed (*i.e.*, the Protected Bid is priced higher than the Protected Offer), then XLE will not route IOC ISO orders to any away Protected Quotations.

[91] *See* proposed Phlx Rule 185(b)(1)(C)(ii). However, if the market is crossed (*i.e.*, the Protected Bid is priced higher than the Protected Offer), then the incoming order will be displayable as a bid (offer) on XLE, in the case of a buy (sell) order, at the same price as the best Protected Quotation Offer (Bid). Further, if the market is locked (*i.e.*, the Protected Bid is priced equal to the Protected Offer) and XLE is displaying an order at the Protected NBBO on the same side of the market as the incoming order, then the incoming order will be displayable at the Protected NBBO.

[92] *See* proposed Phlx Rule 185(b)(1)(D). However, if the market is locked (*i.e.*, the Protected Bid is priced equal to the Protected Offer) and XLE is displaying an order at the Protected NBBO on the same side of the market as the incoming order, then the incoming order will be displayable at the same price as the Protected NBBO. Further, if the market is crossed (*i.e.*, the Protected Bid is priced higher than the Protected Offer), then the incoming order will execute on XLE without regard to away Protected Quotations, and any unexecuted remainder will be displayable on XLE at its limit price.

Limited price orders of the following types may also be executed immediately on XLE: (1) IOC orders; (2) SSO orders; and (3) ISO orders.[93] An IOC order will execute immediately and automatically against existing orders on XLE at their displayable price up to and including the price of the best away Protected Quotation unless the market is crossed (*i.e.,* the Protected Bid is priced higher than the Protected Offer), in which case XLE will ignore the away Protected Quotations.[94] A SSO order will execute immediately and automatically against existing orders on XLE at their displayable price and will be routed away to Protected Quotations (using IOC ISO orders), up to and including the order's limit price.[95] An ISO order will execute immediately and automatically against existing orders on XLE at their displayable price without regard to any away Protected Quotations.[96] Any shares of an IOC, SSO, or ISO order not immediately executed, as described above, will be cancelled.

Pegged Orders. Pegged Orders feature a display price that is set to track either side of the current best Protected Bids or Offers by an amount specified by the XLE Participant in an increment permitted by proposed Phlx Rule 125; provided, however that the display price will not be permitted to lock or cross the market in a manner that would violate proposed Phlx Rule 186.[97] The tracking of the relevant Protected Bid or Offer for Pegged Orders will occur on a real-time basis, except that when the calculated price for the Pegged Order exceeds its limit price, it will no longer track and will remain displayed at its limit price.

2. Two-Sided Orders

XLE also will accept several types of two-sided cross orders, including: (1) Mid-Point Cross Orders; (2) IOC Cross Orders; (3) IOC Cross Orders marked as Benchmark or Qualified Contingent Trades; and (4) cross orders marked for ''non-regular way'' settlement.

Mid-Point Cross and IOC Cross Orders Generally. XLE will accept Mid-Point Cross Orders that execute at the midpoint of the Protected NBBO, unless the Protected Bid is higher than the Protected Offer, in which case the Mid-Point Cross Order will be cancelled.[98] XLE also will accept IOC Cross Orders that execute at a specified price; however, XLE will cancel such order at the time of entry if: (1) The specified price is equal to or inferior to the price of the best order on XLE disseminated pursuant to proposed Phlx Rule 184(c)[99] (except as discussed below); and (2) the specified price would trade through the price of the Protected NBBO, unless the Protected Bid is priced higher than the Protected Offer or the IOC Cross Order is marked as meeting the requirements of an intermarket sweep order in Rule 600(b)(30) of Regulation NMS,[100] as Benchmark, or as a Qualified Contingent Trade.[101]

Approved Dealer Status for Mid-Point Cross Orders and IOC Cross Orders. In addition, with respect to Mid-Point Cross Orders and IOC Cross Orders, Phlx has proposed to use Approved Dealer[102] status in determining whether there will be additional flexibility in how these two-sided orders will be executed.[103] As proposed, XLE will cancel Mid-Point Cross Orders when the Protected NBBO is locked and IOC Cross Orders if such orders would trade: (1) If entered by an Approved Dealer, at the price of a Public Agency Order[104] on XLE disseminated pursuant to proposed Phlx Rule 184(c); or (2) if entered by other than an Approved Dealer, at the price of a Public Agency

Order, a Proprietary Order,[105] or a Professional Order[106] on XLE disseminated pursuant to proposed Phlx Rule 184(c). In other words, XLE will afford Approved Dealers execution priority for their orders over same-priced Professional Orders and Proprietary Orders, but not Public Agency Orders, of other XLE Participants.

Large Mid-Point Cross Orders and IOC Cross Orders. XLE also will allow large Mid-Point Cross Orders and IOC Cross Orders to take priority over same-priced orders on XLE, if the orders meet certain size and other thresholds. In other words, XLE will not cancel a Mid-Point Cross Order or an IOC Cross Order with a price equal to the price of the best disseminated order on XLE, where neither side is marked as Proprietary, and the order is for at least 5,000 shares and has an aggregate value of at least $100,000, and the order is larger than the aggregate size disseminated on XLE at the cross price.[107]

Benchmark and Qualified Contingent Trade Modifiers. As proposed, XLE also will accept two-sided IOC Cross Orders marked as Benchmark Orders or Qualified Contingent Trades. Orders marked ''Benchmark'' will be required to meet the requirements of Rule 611(b)(7) of Regulation NMS.[108] Orders marked ''Qualified Contingent Trade'' will be required to meet the requirements of the exemption to Rule 611 of Regulation NMS issued by the Commission on August 31, 2006.[109]

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[93] *See* proposed Phlx Rule 185(b)(2). Any shares of these orders that are not immediately executed will be cancelled.

[94] *See* proposed Phlx Rule 185(b)(2)(A). Exchange members should remain mindful of their best execution obligations when handling customer order types that may execute on XLE without regard to the best away Protected Quotation when the market is crossed (*i.e.,* the Protected Bid is priced higher than the Protected Offer).

[95] *See* proposed Phlx Rule 185(b)(2)(B).

[96] *See* proposed Phlx Rule 185(b)(2)(C). XLE Participants that enter an ISO order must ensure that the ISO meets the requirements of Regulation NMS Rule 600(b)(30).

[97] *See* proposed Phlx Rule 185(b)(3). *See also* Amendment No. 3, *supra* note 5 (clarifying the definition of Pegged Order).

[98] *See* proposed Phlx Rule 185(c)(1)(C).

[99] An IOC Cross Order will not be permitted to take priority over existing orders on XLE for less than the minimum quoting increment for that NMS Stock indicated in proposed Phlx Rule 125. *See* proposed Phlx Rule 125.

[100] IOC Cross Orders so marked are intended to meet the definition of an intermarket sweep order in Rule 600(b)(30) of Regulation NMS, 17 CFR 242.600(b)(30), because the order has a limit price and the XLE Participant sending the order is responsible to send the other orders required by Rule 600(b)(30)(ii), 17 CFR 242.600(b)(30)(ii).

[101] *See* proposed Phlx Rule 185(c)(3).

[102] *See* proposed Phlx Rule 185(c). The term ''Approved Dealer'' means a Market Maker on XLE in that security or a specialist or market maker registered as such with another exchange or NASD in that security. *See* proposed Phlx Rule 1(a).

[103] The Exchange believes that this provision is similar to former National Securities Exchange (''NSX'') Rule 11.9(l)–(m), (u). *See* Notice, *supra* note 3, 71 FR at 50486 (note 75).

[104] The term ''Public Agency Order'' means an order for the account of a person other than a broker or dealer, which order is represented, as agent, by a XLE Participant. *See* proposed Phlx Rule 1(ee).

[105] The term ''Proprietary Order'' means an order for the account of the XLE Participant who entered the order into XLE. *See* proposed Phlx Rule 1(bb).

[106] The term ''Professional Order'' means an order for the account of a broker or dealer, which order is represented, as agent, by a XLE Participant. *See* proposed Phlx Rule 1(aa).

[107] *See* proposed Phlx Rule 185(c)(1) and (2).

[108] 17 CFR 242.611(b)(7). Under Regulation NMS Rule 611(b)(7), the Benchmark order's price could not be based, directly or indirectly, on the quoted price of the subject security at the time of execution, and the material terms could not have been reasonably determinable at the time the commitment to execute the order was made. *See id.* Orders marked ''Benchmark'' will not be permitted to take priority over existing orders on XLE for less than the minimum quoting increment for that NMS Stock indicated in proposed Phlx Rule 125. *See* Notice, *supra* note 3, 71 FR at 50486 (text accompanying note 77). The Exchange has stated that it will seek an exemption from Rule 612 of Regulation NMS to accept two-sided orders marked Benchmark in increments no smaller than $0.0001. *See id.,* 71 FR at 50485 (note 51). The Exchange has stated that, contrary to its intent as reflected in the Notice, it intends to seek appropriate relief to permit orders to be marked ''Benchmark'' prior to the February 5, 2007 Trading Phase Date for Regulation NMS. *See* Amendment No. 3, *supra* note 5.

[109] *See* Securities Exchange Act Release No. 54389 (August 31, 2006), 71 FR 52829 (September 7, 2006) (order granting an exemption for Qualified Contingent Trades from Rule 611(a) of Regulation

Non-Regular Way Crosses. Finally, XLE will accept cross orders marked for "non-regular way" settlement. Such orders will execute at any price, without regard to the Protected NBBO or any other orders on XLE, provided that Mid-Point Cross Orders marked non-regular way will be cancelled when the Protected Bid is higher than the Protected Offer.[110]

The Commission believes that the Exchange's proposed rules relating to order priority and order execution are designed to perfect the mechanism of a free and open market and a national market system and to protect investors and the public interest, and are consistent with the requirements of the Act. The Commission further believes that these proposed rules are designed to provide investors with flexibility in executing their orders, while still ensuring that customer priority principles are upheld, thereby promoting efficiency of executions and helping to promote competition on the XLE system and the national market system in general.

With respect to the Exchange's proposed rule governing the effect of Approved Dealer status for Mid-Point Cross Orders and IOC Cross Orders, the Commission believes that the Exchange's proposed approach is consistent with the Act in that it protects the price-time priority of non-broker dealer orders by prohibiting Approved Dealers from obtaining priority for their cross orders over same-priced Public Agency Orders on XLE. In addition, the Commission believes that the Exchange's proposal is similar to the rules previously approved for another exchange.[111] The Commission also notes that it has approved rules substantially similar to those proposed by the Exchange relating to large cross orders.[112]

D. Outbound Router

Phlx proposed that PRO Securities LLC ("PRO"), a wholly-owned

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NMS). The Exchange has stated that it no longer intends to permit orders to be marked as "Qualified Contingent Trades" prior to the February 5, 2007 Trading Phase Date for Regulation NMS. *See* Amendment No. 3, *supra* note 5.

[110] *See* proposed Phlx Rule 185(c)(4).

[111] *See* former NSX Rule 11.9(u). *See also* Securities Exchange Act Release Nos. 54391 (August 31, 2006), 71 FR 52836 (September 7, 2006) (File No. SR–NSX–2006–08) (order approving proposed rule change that, among other things, deleted NSX Rule 11.9(u)); and 37046 (March 29, 1996), 61 FR 15322 (April 5, 2006) (File No. SR–CSE–95–03) (order approving proposed rule change regarding the preferencing of public agency orders).

[112] *See, e.g.*, Securities Exchange Act Release Nos. 54391 (August 31, 2006), 71 FR 52836 (September 7, 2006) (File No. SR–NSX–2006–08); and 46568 (September 27, 2002), 67 FR 62276 (October 4, 2002) (File No. SR–Amex–2002–23).

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subsidiary of Order Execution Services Holdings, Inc. ("OES"), operate as a "facility" of the Exchange.[113] PRO's only function will be to provide an optional routing service to XLE Participants, thereby enabling them to route eligible order types[114] from XLE to other securities exchanges, facilities of securities exchanges, automated trading systems, electronic communications networks ("ECNs"), or other brokers or dealers (collectively, "Trading Centers") through other brokers operating on XLE that are members or participants of those trading centers ("Access Brokers") (such function is referred to as the "Outbound Router").

XLE Participants" use of PRO to route orders to another trading center will be optional and subject to Exchange rules. Those XLE Participants that choose to use PRO's Outbound Router function must sign a Routing Agreement. XLE Participants that elect not to use PRO's Outbound Router function may still enter orders on XLE, but they may only enter orders that are not routable to other trading centers.

PRO will be subject to several conditions and undertakings that are reflected in proposed Phlx Rule 185(g). As an Outbound Router, PRO will receive routing instructions from XLE, route orders to broker-dealers to route to another trading center, and report such executions back to XLE. All orders routed through PRO will be subject to the Exchange's rules. PRO will not be able to change the terms of an order or the routing instructions, nor will PRO have any discretion about where to route an order.

As a facility of the Exchange, the Outbound Router function of PRO will be subject to the Commission's continuing oversight. In particular and without limitation, under the Act, the Exchange will be responsible for filing with the Commission rule changes and fees relating to the PRO Outbound Router function, and PRO will be subject to exchange non-discrimination requirements.[115] Further, the Exchange has represented that the National Association of Securities Dealers, Inc. ("NASD") will be responsible for regulatory oversight and enforcement as the Outbound Router's Designated

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[113] *See* 15 U.S.C. 78c(a)(2). PRO is a broker-dealer and a member of the NASD, and is applying to become a member of the Exchange. The Exchange has represented that PRO will not engage in any business other than its Outbound Router function, except as approved by the Commission. *See* Notice, *supra* note 3, 71 FR at 50493.

[114] Certain order types, including Limit Orders, Reserve Orders, and SSOs are eligible to be routed.

[115] *See* 15 U.S.C. 78f(b)(5).

Examining Authority ("DEA") pursuant to Rule 17d–1 of the Act.[116] In addition, the Exchange intends to enter into a 17d–2 agreement with the NASD to regulate PRO for compliance with applicable Exchange rules and federal securities rules and regulations.[117]

The Exchange notes that the PRO's Outbound Routing function includes the clearing functions that it may perform for trades with respect to orders routed to other trading centers. Pursuant to proposed Rule 185(g), the Exchange will be required to establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the Exchange and the Routing Facility, and any other entity, including any affiliate of the Routing Facility. Moreover, the books, records, premises, officers, agents, directors and employees of the Routing Facility, as a facility of the Exchange, will be deemed to be the books, records, premises, officers, agents, directors and employees of the Exchange for purposes of, and subject to oversight pursuant to, the Act. Further, the books and records of the Routing Facility, as a facility of the Exchange, will be subject at all times to inspection and copying by the Exchange and the Commission.

The Commission agrees with the Exchange that PRO's services as Outbound Router would qualify it as a "facility" of the Exchange, and, consequently, the operation of the Outbound Router will be subject to Exchange oversight, as well as Commission oversight. The Commission notes that the Outbound Router functionality is not the exclusive means for accessing better-priced orders in other market centers should an order not be executable on XLE. Accordingly, PRO's routing services are optional, and a XLE Participant is free to route its orders to other market centers through alternative means. In light of the protections afforded by the conditions discussed above, the Commission believes that the Exchange's Outbound Router function, and the rules and procedures governing the Outbound Router, are appropriate and consistent with the Act.

E. Market Makers

The Exchange will allow XLE Participants that are member organizations to register to act as Market

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[116] 17 CFR 240.17d–1. *See also* Notice, *supra* note 3, 71 FR at 50493.

[117] *See* Notice, *supra* note 3, 71 FR at 50493.

Makers on XLE.[118] Market Makers, once registered as such, can then choose to register in one or more securities that are traded on XLE. Once registered in a particular security, Market Makers will be required to maintain continuous Limit Orders on both sides of the market in that security during XLE's Core Session.

Although the proposed rules provide for Market Makers, an NMS Stock may trade on XLE without a Market Maker. While the presence of a Market Maker in a security is not required, the Exchange has proposed to allow Market Makers to provide an additional source of liquidity to XLE in the securities in which the Market Maker is making markets. Market Makers can use any of the order types available to any other XLE Participant, but there are no special order types or quotations available to Market Makers. Orders from Market Makers on XLE will be treated the same as orders from other XLE Participants. In addition, Market Makers will not have any special or enhanced access to, or responsibility for, the orders on XLE in any given security.

Proposed Phlx Rule 170 governs the registration of Market Makers on XLE. The Exchange will review an application of a member organization to become a Market Maker, considering such factors as capital, operations, personnel, technical resources, and disciplinary history.[119] In the event that an application is disapproved by the Exchange, the applicant would have an opportunity to be heard upon the specific grounds for the denial, in accordance with the provisions of proposed Phlx Rule 174.[120]

The registration of a Market Maker may be suspended or terminated by the Exchange upon a determination of any substantial or continued failure by such Market Maker to engage in dealings in accordance with proposed Phlx Rule 173, which describes the obligations of Market Makers.[121] Additionally, a Market Maker may withdraw its registration by giving written notice to the Exchange.[122] Subsequent to withdrawal, the member organization will not be permitted to re-register as a Market Maker for a period of six months.[123]

Once registered as a Market Maker, a member organization may register in a newly authorized security or in a security already admitted to dealings on XLE by filing a security registration form with the Exchange.[124] A Market Maker's registration in a security may be terminated by the Exchange if the Market Maker fails to enter quotations in the security within five business days after the Market Maker's registration in the security becomes effective.[125] In addition, the Exchange may suspend or terminate any registration of a Market Maker in a security or securities under proposed Phlx Rule 172 whenever, in the Exchange's judgment, the interests of a fair and orderly market are best served by such action.[126]

Upon becoming a Market Maker and registering in one or more securities on XLE, a Market Maker will be required to assume a number of responsibilities.[127] A Market Maker must engage in a course of dealings for its own account to assist in the maintenance, insofar as reasonably practicable, of a fair and orderly market on XLE. Among other things, a Market Maker must maintain adequate minimum capital in accordance with Phlx Rule 703 and must remain in Good Standing[128] with the Exchange. Each Market Maker must use electronic system(s) to maintain continuously two-sided markets with at least one Limit Order to buy and at least one Limit Order to sell, each for at least a round lot, in those securities in which the Market Maker is registered to trade. A Market Maker must meet these obligations during XLE's Core Session in its registered securities on all days that XLE is open for business.[129]

Market Maker Authorized Traders. Because Market Makers must be member organizations, individuals who enter orders on XLE in the course of making markets for a Market Maker are Market Maker Authorized Traders ("MMATs"). The Exchange may, upon receiving an application in writing from a Market Maker on a form prescribed by the Exchange, register a member of the Exchange as a MMAT. Each MMAT must be a member of the Exchange at all times he or she is acting as a MMAT.[130] All orders entered by a MMAT must

contain the identification of the individual MMAT that entered the order.[131] MMATs may be officers, partners, employees or other associated persons of member organizations that are registered with the Exchange as Market Makers.[132] The Exchange may grant a member conditional registration as a MMAT subject to any conditions it considers appropriate in the interests of maintaining a fair and orderly market.[133] In addition, to be eligible for registration as a MMAT, a person must have served as a dealer-specialist or market maker on a registered national securities exchange or association (or be deemed to have similar experience from having functioned as a trader) for at least one year within three years of the date of application, or, in the alternative, must successfully complete the General Securities Registered Representative Examination ("Series 7").[134]

Upon written request, a member organization may withdraw the registration of one of its MMATs.[135] In addition, the Exchange may suspend or withdraw an MMAT's registration if it determines that: (1) The MMAT has caused the Market Maker to not properly perform the responsibilities of a Market Maker; (2) the MMAT has failed to meet the conditions set forth under the preceding paragraph; or (3) the Exchange believes it is in the interest of maintaining fair and orderly markets.[136] If the Exchange suspends the registration of a person as a MMAT, the Market Maker must not allow the person to submit orders on XLE.[137]

The Commission believes that the proposed rules concerning Market Makers and MMATs are appropriate and consistent with the Act.

F. Access

Members and member organizations can register with the Exchange to become XLE Participants, which requires entering into a XLE Participant Agreement with the Exchange.[138] In addition to providing access to its members and member organizations, the Exchange has proposed to allow

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[118] *See* proposed Phlx Rule 170(a) and (b).

[119] *See* proposed Phlx Rule 170(b).

[120] *See* proposed Phlx Rule 170(c).

[121] *See* proposed Phlx Rule 170(d).

[122] *See* proposed Phlx Rule 170(e). A Market Maker who fails to give a ten-day written notice of withdrawal to the Exchange may be subject to formal disciplinary action pursuant to Phlx Rule 960.1 *et seq.*

[123] *See* proposed Phlx Rule 170(e).

[124] *See* proposed Phlx Rule 172(a).

[125] *See* proposed Phlx Rule 172(b).

[126] *See* proposed Phlx Rule 172(d). Any such suspension or withdrawal of privileges by the Exchange would be subject to review pursuant to proposed Phlx Rule 174, which permits an appeal to the Board of Governors pursuant to By-Law Article XI, Section 11–1(a).

[127] *See* proposed Phlx Rule 173(a).

[128] *See* proposed Phlx Rule 1(h).

[129] *See* proposed Phlx Rule 173(b).

[130] *See* proposed Phlx Rule 171(b).

[131] *See* proposed Phlx Rule 171(a).

[132] *See* proposed Phlx Rule 171(b)(1).

[133] *See* proposed Phlx Rule 171(b)(3).

[134] *See* proposed Phlx Rule 171(b)(5).

[135] *See* proposed Phlx Rule 171(c)(3).

[136] *See* proposed Phlx Rule 171(c)(1).

[137] *See* proposed Phlx Rule 171(c)(2). Any such suspension or withdrawal of MMAT privileges by the Exchange is subject to review pursuant to proposed Phlx Rule 174.

[138] *See* proposed Phlx Rule 180(a). Among other things, the Exchange would confirm that the member or member organization has the proper clearing relationships and has the ability to electronically connect to XLE.

member organizations to sponsor other persons to gain access to XLE. When doing so, these member organizations will be referred to as ''Sponsoring Member Organizations,'' and the persons sponsored will be referred to as ''Sponsored Participants.'' [139] A Sponsored Participant and its Sponsoring Member Organization will be required to enter into and maintain a XLE Participant Agreement with the Exchange, in which the Sponsoring Member Organization must designate the Sponsored Participant by name.[140] The XLE Participant Agreement is intended to highlight the responsibilities that a XLE Participant has regarding its use of XLE and bind Sponsored Participants to their terms of use of XLE.

Sponsored Participants also will be required to enter into and maintain customer agreements with one or more Sponsoring Member Organizations so that Sponsoring Member Organizations may maintain the requisite level of control over the Sponsored Participants' trading on XLE. The Exchange has proposed certain sponsorship provisions in its proposed Rule 180. Among other things, these agreements will specify that all orders entered by the Sponsored Participants and any person acting on behalf of or in the name of such Sponsored Participant and any executions occurring as a result of such orders are binding in all respects on the Sponsoring Member Organization, and that the Sponsoring Member Organization is responsible for any and all actions taken by such Sponsored Participant and any person acting on behalf of or in the name of such Sponsored Participant. In addition, the agreement will specify that a Sponsored Participant may not permit anyone other than its Participant Authorized Users (''PAUs'') to use or obtain access to XLE, and the Sponsored Participant is required to establish adequate procedures and controls to monitor access and prevent unauthorized use or access to XLE.

The Commission believes that the Exchange's proposed rules relating to access to XLE for its members and member organizations and certain other persons who are sponsored by member organizations are consistent with the Act. The Commission notes that it has previously approved similar rules for other exchanges.[141]

G. Anonymity

Except as provided below, transactions executed on XLE will be processed anonymously. XLE transaction reports will indicate the details of the transaction, but will not reveal contra-party identities.[142] XLE will maintain this anonymity after the execution by instructing the registered clearing agencies of the anonymous nature of the transaction.[143] Additionally, no one who has the right to trade on XLE and who has been a party to or has knowledge of an execution will be under an obligation to divulge, except to the Exchange, the name of the person buying or selling in any transaction.[144] By masking the XLE Participant's identity, the Exchange believes that it may help XLE Participants mitigate the market impact of their orders.[145]

Notwithstanding the above, the Exchange will reveal the identity of the member organization or the member organization's clearing firm in the following limited circumstances: (1) For regulatory purposes or to comply with an order of a court or arbitrator; (2) when the National Securities Clearing Corporation (''NSCC'') or Stock Clearing Corporation of Philadelphia (''SCCP'') ceases to act for a member organization or the member organization's clearing firm and NSCC or SCCP determines not to guarantee the settlement of the member organization's trades; or (3) on risk management reports provided to the contra-party of the member organization or the member organization's clearing firm which disclose trading activity on an aggregate dollar value basis.[146] Also, the Exchange will inform a member organization when that member organization submits an order that has

executed against an order submitted by that same member organization.[147]

In order to satisfy the member organization's recordkeeping obligations under Rules 17a–3(a)(1) [148] and 17a–4(a) under the Act,[149] the Exchange will, except as provided below, retain for the period specified in Rule 17a–4(a) the identity of each member organization that executes an anonymous transaction described in paragraph (b) of proposed Phlx Rule 189. In addition, member organizations will retain the obligation to comply with Rules 17a–3(a)(1) and 17a–4(a) under the Act whenever they possess the identity of their contra-party. In either case, the information must be retained in its original form or a form approved under Rule 17a–6 under the Act.[150] The Commission believes that the proposed rules relating to anonymity are appropriate and consistent with the Act.

In connection with XLE's proposed clearance and settlement anonymity, the Exchange has stated that it intends to request, for XLE Participants, an exemption from Rule 10b–10 under the Act,[151] regarding the required disclosure of the contra-party on a customer's confirmation, and a no-action position on Rules 17a–3 and 17a–4 under the Act,[152] regarding a XLE Participant's reliance on the Exchange for recordkeeping responsibilities for anonymous executions.[153] The Commission notes that the Exchange may not commence operations on its XLE system with the anonymity functionality until it has obtained relief from the applicable rules discussed above.

H. Other Rule Changes to Implement XLE

In addition to the proposed rules described above, to implement XLE, the Exchange has proposed several new rules and has proposed to amend a number of other existing Exchange rules that address, among other things, hours of trading, units of trading, price variations, securities eligible for trading, trade execution and reporting, clearance and settlement, and limitation of liability. The Commission believes that these proposed rule changes are appropriate and consistent with the Act.

[139] *See* proposed Phlx Rule 180(b).
[140] *See* proposed Phlx Rule 180(b)(2)(A).
[141] *See, e.g.,* NYSE Arca Rule 7.29.

[142] *See* Proposed Phlx Rule 189(b).
[143] *See* Securities Exchange Act Release Nos. 52651 (October 21, 2005), 70 FR 65956 (November 1, 2005) (File No. SR–SCCP–2004–03); 48526 (September 23, 2003), 68 FR 56367 (September 30, 2003) (File No. SR–NSCC–2003–14). *See also* Letter from Everton McLennon, Vice President, SCCP, to Jerry Carpenter, Assistant Director, Division of Market Regulation, Commission, dated September 12, 2006 (notifying the Commission, as required by a condition of approval to File No. SR–SCCP–2004–03, that SCCP intends to begin processing trades executed on an anonymous trading system).
[144] *See* Proposed Phlx Rules 161 and 189(c). Since the Exchange's proposed clearly erroneous execution rule will be coordinated by the Exchange, the Exchange has stated that post-trade anonymity should not compromise a XLE Participant's ability to settle an erroneous trade. *See* Notice, *supra* note 3, 71 FR at 50488.
[145] *See, e.g.,* Securities Exchange Act Release No. 49053 (January 12, 2004), 69 FR 2642 (January 16, 2004) (File No. SR–PCX–2003–63) (notice of filing and immediate effectiveness of proposed rule change relating to post-trade anonymity).
[146] *See* Proposed Phlx Rule 189(c).

[147] *See* Proposed Phlx Rule 189(d).
[148] 17 CFR 240.17a–3(a)(1).
[149] 17 CFR 240.17a–4(a).
[150] 17 CFR 240.17a–6.
[151] 17 CFR 240.10b–10.
[152] 17 CFR 240.17a–3 and 17 CFR 240.17a–4, respectively.
[153] *See, e.g.,* Letter from Brian A. Bussey, Assistant Chief Counsel, Division of Market Regulation, Commission, to Mai S. Shiver, Senior Counsel, Pacific Exchange, Inc., dated April 30, 2004.

I. Modifications to Current Phlx By-Laws and Rules

Aside from the proposed rules to implement XLE, as part of its proposed rule change, the Exchange also proposes to modify various Phlx By-laws, Rules, Equity Floor Procedure Advices ("EFPAs"), and Options Floor Procedure Advices ("OFPAs").[154] Most of the changes are being made to either apply or disapply certain Phlx By-laws, Rules, EFPAs and OFPAs to XLE, or to reflect the elimination of the physical trading floor for equity securities and the status of XLE as its replacement. In addition, the proposed changes reflect the elimination of the Floor Procedure Committee and the Equity Allocation, Evaluation and Securities Committee, and reflect the elimination of PACE, the Exchange's current electronic system for trading equity securities.

With respect to the proposed elimination of the Floor Procedure Committee,[155] the Exchange has represented that Phlx officers and employees will handle matters that were previously referred to Floor Officials or the Committee on the equity floor. The Exchange is eliminating the Floor Procedure Committee because it believes that its function in governing conduct on the equity trading floor is no longer necessary in light of the floor's elimination. With respect to the elimination of the Equity Allocation, Evaluation and Securities Committee, the Exchange has proposed that Exchange staff will be responsible for processing applications to become Market Makers on XLE. As proposed, Exchange staff also will be responsible for managing the listing of new equities. The Commission believes that these proposed rule changes, including the elimination of the Floor Procedure Committee and the Equity Allocation, Evaluation and Securities Committee, are appropriate and consistent with the Act.

The Exchange also has proposed to delete several of its rules and forms relating to the delivery and settlement of securities, which the Exchange has represented are obsolete since such function is performed not by the Exchange but by registered clearing agencies. Further, the Exchange has proposed to require all XLE Participants to use the services of a clearing firm or SCCP to clear transactions on XLE.[156]

The Commission believes that these proposed rule changes are appropriate and consistent with the Act.

Additionally, the Exchange is proposing to amend Phlx Rule 604 (Registration and Termination of Registered Persons), to extend an exemption from the requirement to complete the Series 7 examination to persons who are primarily engaged in business on XLE and whose member organization is assigned to the Exchange as their designated examining authority.[157] Phlx Rule 604(e)(1) applies the Exchange's competency requirement to persons "off the floor," while persons trading on the Exchange's equity floor are not required by Phlx Rule 604 to take the Series 7 examination. XLE will not have a physical trading floor, and thus all XLE Participants literally will be conducting their business "off floor." Accordingly, the Exchange proposed to amend Phlx Rule 604 to maintain the status quo with respect to the Exchange's Series 7 examination requirement for XLE Participants.[158] The Commission believes that the proposed change to Phlx Rule 604 is appropriate and consistent with the Act.

J. Compliance With Regulation NMS and Transition to XLE

The Commission believes that the proposed rule change is consistent with the requirements of Regulation NMS. In particular, the Exchange proposes to adopt a rule with regard to locked and crossed markets, as required by Rule 610(d) of Regulation NMS.[159] The Exchange also has designed its proposed rules relating to orders, modifiers, and order execution rules to comply with the requirements of Regulation NMS.[160] These proposed rules include marking certain orders meeting the requirements of Rule 600(b)(30) of Regulation NMS [161]

as intermarket sweep orders and accepting orders marked as intermarket sweep orders. The Commission also believes that Phlx's proposed immediate-or-cancel functionality [162] is consistent with Rule 600(b)(3) of Regulation NMS.

Further, the Exchange intends to operate XLE as an "automated trading center" as defined by Rule 600(b)(3) of Regulation NMS,[163] and has designed the proposed trading rules for XLE accordingly. Specifically, XLE will display automated quotations at all times except in the event that a systems malfunction renders XLE incapable of displaying automated quotations.[164] The Exchange has represented that it will halt trading and therefore not display any "manual" quotations in the event of such a systems malfunction.[165] In addition, the Exchange included in proposed Phlx Rule 185(h) [166] its intent to take advantage of the self-help provisions of Regulation NMS in the event that another trading center providing a Protected Bid, Offer or Quotation repeatedly fails to respond within one second to incoming orders attempting to access that Protected Bid, Offer or Quotation.[167]

Transition to XLE. The Exchange has declared its intent to make the transition to XLE (thus closing its equities trading floor and PACE system) prior to the February 5, 2007 Trading Phase Date for Regulation NMS. As such, certain of its proposed rules or portions thereof that are designed to comply with the provisions of Regulation NMS will not become effective until February 5, 2007. The Exchange has proposed to achieve this delayed effectiveness through: (1) Including specific provisions in certain of its proposed rule text; [168] or (2) by

[154] *See* Notice, *supra* note 3, 71 FR at 50494 (for a discussion of the modifications to current Phlx By-laws and Rules).

[155] Currently, at least 50% of the Floor Procedure Committee must consist of permit holders or persons associated with a member organization.

[156] *See* proposed Phlx Rule 165(a).

[157] The Exchange initially adopted the Series 7 examination requirement for off-floor traders in order to impose a competency requirement on persons not on its floor, and not subject to its registration and testing processes for floor personnel pursuant to Phlx Rules 620 and 625.

[158] XLE Participants could, however, be required by the rules of another self-regulatory organization to take the Series 7 examination.

[159] 17 CFR 242.610(d). *See also* proposed Phlx Rule 186.

[160] For example, Proposed Phlx Rule 188 will require the Exchange to identify trades executed pursuant to an exception to or exemption from Rule 611 of Regulation NMS in accordance with specifications approved by the operating committee of the relevant national market system plan for an NMS Stock. For trades executed pursuant to both the intermarket sweep order exception of Rule 611(b)(5) or (6) of Regulation NMS and the self-help exception of Rule 611(b)(1) of Regulation NMS, XLE will identify those trades as executed pursuant to the intermarket sweep order exception. *See* proposed Phlx Rule 188, as amended by Amendment No. 3.

[161] 17 CFR 242.600(b)(30).

[162] *See* proposed Phlx Rule 185(b)(2)(A).

[163] 17 CFR 242.600(b)(3).

[164] *See* proposed Phlx Rule 160.

[165] *See* Notice, *supra* note 3, 71 FR at 50483.

[166] *See* Amendment No. 3, *supra* note 5 (relocating the self-help provision from proposed Phlx Rule 1(cc) to proposed Phlx Rule 185(h)).

[167] *See* 17 CFR 242.611(b)(1). In particular, proposed Phlx Rule 185(h), which contains text that was relocated from proposed Phlx Rule 1(cc) via Amendment No. 3, provides that Phlx will disregard the away Protected Bid, Offer or Quotation when routing, displaying, canceling, or executing orders on XLE, and Phlx will notify the non-responding trading center when it elects self-help. Phlx will also assess whether the cause of the problem was with XLE, and, if so, would not invoke self-help.

[168] *See*, *e.g.*, proposed Phlx Rule 1(cc) (the definition of Protected Bid, Offer or Quotation). The Exchange has provided for alternate definitions of "Protected Bid, Offer or Quotation" that are applicable both before and after Rule 611 of Regulation NMS is operative on the Exchange. *See* Notice, *supra* note 3, 71 FR at 50484. After Rule 611 of Regulation NMS is operative, a Protected Quotation will have the same meaning as Rule

requesting that the Commission allow the Exchange to delay the effectiveness of a particular proposed rule;[169] or (3) as applicable, expressing its intent to apply to for any necessary relief from any provision of the ITS Plan still in effect.[170] The Exchange intends to roll-out XLE in several phases, as discussed above in Section II.

The Commission believes that the Exchange has proposed a reasonable approach that should help ensure that the appropriate Exchange rules are in place when the operative date of the applicable Regulations NMS provisions occurs.[171]

V. Accelerated Approval of Amendment No. 3

As set forth below, the Commission finds good cause to approve Amendment No. 3 to the proposed rule change prior to the thirtieth day after Amendment No. 3 is published for comment in the **Federal Register** pursuant to section 19(b)(2) of the Act.[172] In Amendment No. 3, the Exchange made several technical, non-substantive changes to the proposed rule text to correct typographical errors

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600(b)(57) and (58) of Regulation NMS. 17 CFR 242.600(b)(57)–(58).

[169] *See, e.g.,* proposed Phlx Rule 186; and Notice, *supra* note 3, 71 FR at 50489. *See, e.g.,* proposed Phlx Rule 186 (Locking or Crossing Quotations in NMS Stocks).

[170] *See, e.g.,* proposed Phlx Rule 185(c)(3); and Amendment No. 3, *supra* note 5. For example, with respect to the proposed incoming ISO Orders and IOC Cross Orders marked as ISO orders, and two-sided orders that are eligible to be marked ''Benchmark,'' the Exchange has stated that it intends to implement these order types prior to the Trading Phase Date for Regulation NMS, and accordingly, the Exchange would need to seek relief for any applicable provision of the ITS Plan that remains in effect. *See* Amendment No. 3, *supra* note 5.

[171] The Commission notes that, in the period preceding the operative date of Regulation NMS, the Exchange remains subject to currently applicable intermarket rules, including the ITS Plan. To the extent that the Exchange commences operations before Regulation NMS is operative, with respect to certain XLE features or order types, the Exchange, like all other exchanges subject to Regulation NMS, would need to obtain relief from any contrary provisions contained in any applicable plan, rule, or regulation. For example, in the absence of a Market Maker, XLE will not necessarily be able to maintain a continuous two-sided quote in a given security and thus will need relief from the ITS Plan's two-sided quote requirement. Similarly, the Exchange will need relief from the ITS Plan to recognize an exception permitting two-sided Benchmark orders and Qualified Contingent Trades to trade-through a Protected Quotation. Finally, the Exchange has proposed to delete Phlx Rule 230 (ITS—Opening Notification) and EFPA S–3 (The ''Three by Three'' Requirement Applicable to Tape Indications and Pre-Openings); however, the Exchange has requested that the operative date of these deletions be no earlier than the date that the Exchange is no longer subject to the ITS pre-opening notification responsibilities in the ITS Plan.

[172] 15 U.S.C. 78s(b)(2).

and to include proper formatting of proposed rule text. In addition, the Exchange added language to proposed Phlx Rule 188 regarding identifiers for trades executed pursuant to both the intermarket sweep exception and the self-help provision in Rule 611 of Regulation NMS; relocated the self-help provision from proposed Phlx Rule 1(cc) to proposed Phlx Rule 185(h) and changed the term ''cease to consider'' in that subsection to the word ''disregard''; and added text to proposed Phlx Rule 185(b)(3) to clarify the operation of Pegged Orders and clarified the purpose section discussion of that proposed rule. The Exchange also amended the terminology in proposed Phlx Rule 163 from ''Exchange Official'' to ''Equity Exchange Official.'' In addition, the Exchange proposed to allow floor members and member organizations who become XLE participants to remain in their current space on the Exchange's floor, paying the applicable space rental fees (which the Exchange may or may not seek to eliminate during the transition to XLE, upon the filing of a proposed rule change with the Commission), for a short time while the Exchange's members transition to XLE. The Exchange also announced its revised intent, contrary to its intent expressed in the Notice, to request the appropriate relief from the ITS Plan provisions that remain in effect to implement ISO Orders and IOC Cross Orders marked ISO, as well as orders marked ''Benchmark,'' before the February 5, 2007 Trading Phase Date of Regulation NMS. The Exchange further stated that it no longer intends to request relief to allow orders marked as a ''Qualified Contingent Trade'' prior to the February 5, 2007 Trading Phase Date of Regulation NMS.

The Commission believes that these clarifying and technical changes to the proposed rule change, as amended, improve the proposal and raise no new or novel issues and therefore should not delay approval of the proposed rule change, as amended. Accordingly, the Commission finds good cause to accelerate approval of Amendment No. 3, pursuant to section 19(b)(2) of the Act.[173]

VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 3, including whether Amendment No. 3 is consistent with the Act. Comments may be submitted by any of the following methods:

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[173] 15 U.S.C. 78s(b)(2).

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.* Please include File Number SR–Phlx–2006–43 on the subject line.

Paper Comments

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. All submissions should refer to File Number SR–Phlx–2006–43. 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 the filing also will be available for inspection and copying at the principal office of the Phlx. 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–Phlx–2006–43 and should be submitted on or before October 27, 2006.

VII. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[174] that the proposed rule change (SR–Phlx–2006–43), as amended by Amendment Nos. 1 and 2, be, and hereby is, approved, and that Amendment No. 3 to the proposed rule change be, and hereby is, approved on an accelerated basis.

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[174] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[175]

Nancy M. Morris,

Secretary.

[FR Doc. E6–16550 Filed 10–5–06; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice 5575]

Department of State Performance Review Board Members (for Non Career Senior Executive Employees)

In accordance with section 4314 (c) (4) of the Civil Service Reform Act of 1978 (Pub. L. 95–454), the Executive Resources Board of the Department of State has appointed the following individuals to the Department of State Performance Review Board (for Non Career Senior Executive Employees) Kim M. Nickles, Under Secretary for Management, White House Liaison, Department of State; Brian F. Gunderson, Chief of Staff, Office of the Secretary, Department of State.

Dated: September 15, 2006.

George M. Staples,

Director General of the Foreign Service and Director of Human Resources, Department of State.

[FR Doc. E6–16591 Filed 10–5–06; 8:45 am]

BILLING CODE 4710–15–P

SUSQUEHANNA RIVER BASIN COMMISSION

Notice of Action by the Commission Approving Certain Projects

AGENCY: Susquehanna River Basin Commission (SRBC).

SUMMARY: Pursuant to its authority under the Susquehanna River Basin Compact, Pub. L. 91–575, 84 Stat. 1509 *et seq.* (the ''Compact'') and its Regulations for Review of Projects, 18 CFR parts 803, 804 and 805, the SRBC, following a public hearing, approved certain water resources projects listed below at its meeting held in Aberdeen, Maryland on September 13, 2006.

Opportunity For Review: In accordance with Section 3.10(6) of the Compact and Paragraph (o) of the Federal Reservations to the Compact, all such actions of the SRBC are reviewable in federal district court provided that an action for such review is commenced within 90 days from the effective date of the determination sought to be reviewed. For purposes of judicial

[175] 17 CFR 200.30–3(a)(12).

review, the effective date for actions identified in this notice shall be the date of publication of this notice.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel, 717–238–0423, Ext. 306; Fax: 717–238–2436; e-mail: *rcairo@src.net* or Michael G. Brownell, Chief, Water Resources Management, 717–238–0425, Ext. 223; Fax: 717–238–2436; e-mail *mbrownell@srbc.net.* Further details on the docket actions taken on the projects listed below are also available on SRBC's Web site at *http://www.srbc.net.*

SUPPLEMENTARY INFORMATION:

List of Approved Projects

1. Mansfield Borough Municipal Authority—Groundwater withdrawal (30-day average) of 0.252 mgd from Well 2, and a total groundwater system withdrawal limit (30-day average) of 0.255 mgd, for public water supply, Richmond Township, Tioga County, Pennsylvania.

2. Tunkhannock Borough Municipal Authority—Groundwater withdrawal (30-day average) of 0.144 mgd from Well 3R, and a total system withdrawal limit (30-day average) of 0.300 mgd for public water supply, Tunkhannock Borough, Wyoming County, Pennsylvania.

3. EP FCL, LLC dba Ron Jaworski's Edgewood in the Pines—Consumptive water use of up to 0.360 mgd, for golf course irrigation, Butler Township, Luzerne County, Pennsylvania.

4. Bedford Township Municipal Authority Schaffer Tract—Groundwater withdrawals (30-day averages) of 0.288 mgd from Schaffer Tract Well 1 and 0.288 mgd from Schaffer Tract Well 2, Bedford Township, Bedford County, Pennsylvania.

5. Bedford Township Municipal Authority Hotel Well—Groundwater withdrawal (30-day average) of 0.367 mgd from the Bedford Springs Hotel Well 1, Bedford Township, Bedford County, Pennsylvania.

6. Monroe Valley Golf Course—Surface water withdrawal of up to 0.221 mgd from East Pond, when available; surface water withdrawal of up to 0.221 mgd from West Pond, when available; and a total combined surface water withdrawal of up to 0.532 mgd, when available, from East Pond, West Pond, and Monroe Creek; and consumptive water use of up to 0.532 mgd, for golf course irrigation, Swatara Township, Lebanon County, Pennsylvania.

7. Dairy Farmers of America, Inc.—Consumptive water use of up to 0.500 mgd, for manufacture of beverages, Lower Allen Township, Cumberland County, Pennsylvania.

8. Manheim Borough Authority—Groundwater withdrawal (30-day average) of 0.936 mgd from Well 6, and a total system withdrawal limit (30-day average) of 0.936 mgd for public water supply, Manheim Borough, Lancaster County, Pennsylvania.

Dated: September 27, 2006.

Paul O. Swartz,

Executive Director.

[FR Doc. E6–16611 Filed 10–5–06; 8:45 am]

BILLING CODE 7040–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Release of Waybill Data

The Surface Transportation Board has received a request from Sidley Austin Brown LLP on behalf of Canadian Pacific Railway Company (WB471–10—September 28, 2006) for permission to use certain data from the Board's Carload Waybill Samples. A copy of the request may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

Contact: Mac Frampton, (202) 565–1541.

Vernon A. Williams,

Secretary.

[FR Doc. E6–16606 Filed 10–5–06; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–6 (Sub-No. 445X)]

BNSF Railway Company— Abandonment Exemption—in Cascade County, MT

BNSF Railway Company (BNSF) has filed a notice of exemption under 49 CFR 1152 subpart F—*Exempt Abandonments* to abandon 1.67 miles of railroad between milepost 194.61 and milepost 196.28, near Great Falls, in Cascade County, MT. The line traverses United States Postal Service Zip Code 59401.

BNSF has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic to be rerouted; (3) no formal complaint filed by a user of rail service on the line (or by a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the