

the issuance of permits.<sup>13</sup> Certain commenters predicted lawsuits against the Exchange if ETPs were issued,<sup>14</sup> and one commenter stated that a campaign to hurt one lessor in particular has “blinded” people.<sup>15</sup> Another commenter suggested that if they are issued, ETPs should be “phased in.”<sup>16</sup> The Exchange has determined in its business judgment, however, that the potential benefits to the Exchange of the trading permits, including the potential for increased access and enhanced competition on the trading floor and the opportunity to attract additional order flow and new business, justify any possible dilution of memberships and may, in the longer term, result in higher prices for regular memberships. The Exchange is also of the view that the benefits of the ETP program to the Exchange are such that a phasing-in approach would not be desirable. The Exchange further believes that it is proceeding appropriately with respect to ETPs and that any lawsuit of the kind alluded to by certain commenters would be groundless. The Exchange believes that ETPs are in the best interests of the Exchange and its membership as a whole (including both lessee members and lessor owners), and notes that the Exchange’s stated purpose in Article Third of its Certificate of Incorporation is “[t]o act as and to provide a securities exchange where [its] members and other persons authorized by it” can deal in securities.

The Petition submitted by George E. Synder III demanded that any proposed rules regarding the issuance of trading permits be put to a vote of owner-members. One comment letter stated that seat owners should be eligible to vote on all issues that come before the membership,<sup>17</sup> and another stated that creation of ETPs requires a membership vote.<sup>18</sup> However, neither the Certificate of Incorporation nor the By-laws require a vote to be taken by either seat owners or members on the subject of issuance of trading permits. Further, practically all voting rights are vested in “members”<sup>19</sup> rather than seat owners under Phlx’s Certificate of Incorporation and By-laws.<sup>20</sup>

One commenter stated that the Exchange’s Certificate of Incorporation and By-laws do not permit the creation of ETPs, and that creation of ETPs requires a By-law amendment.<sup>21</sup> The Exchange believes that the Certificate of Incorporation already permits ETPs, and that a By-law amendment is therefore not required.<sup>22</sup> The Exchange notes that the amendment to the Certificate of Incorporation proposed in Article Twenty-First would clearly authorize permits in any event and would supersede any inconsistent provision in the By-laws as a matter of basic corporate law.

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

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

- (A) By order approve such proposed rule change, or
- (B) Institute proceedings to determine whether the proposed rule change should be disapproved.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the

public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission’s Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx.

All submissions should refer to File No. SR-Phlx-00-02 and should be submitted by September 22, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>23</sup>

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43212; File No. SR-Phlx-00-03]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendments No. 1 and 2 by the Philadelphia Stock Exchange, Inc. Relating to the Issuance of Equity Trading Permits

August 25, 2000.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) <sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 12, 2000, the Philadelphia Stock Exchange, Inc. (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed amendments to the proposed rule change on May 30, 2000<sup>3</sup> and July 12, 2000.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules to provide for the issuance of

<sup>13</sup> See Benton Letter, Elwell Letter, First and Second Green Letters, Janney Letter, Synder Letter dated July 20, 1999, Taylor Letter, Wayne Letter, and First and Second Leff E-mails.

<sup>14</sup> See Benton Letter, Wayne Letter, and First Kramer E-mail.

<sup>15</sup> See Second Kramer E-mail.

<sup>16</sup> See Taylor Letter and Taylor E-mail.

<sup>17</sup> See Second Green Letter.

<sup>18</sup> See Liang Letter.

<sup>19</sup> In this instance, the term “member” refers to the holder of legal title of the seat.

<sup>20</sup> See Article Thirteenth of the Exchange’s Certificate of Incorporation and Phlx By-law Article

XII, Section 12-6. Seat owners (*i.e.*, holders of “equitable” title to an Exchange membership) are entitled to vote in any decision relating to a compromise or arrangement between the Phlx and its creditors or its members, or relating to a reorganization of the Phlx. Other voting rights belong to the members (*i.e.*, holders of legal title to an Exchange membership).

<sup>21</sup> See Liang Letter.

<sup>22</sup> As noted above, the Exchange’s stated purpose in Article Third of its Certificate of Incorporation is “[t]o act as and to provide a securities exchange where [its] members and other persons authorized by it” can deal in securities. Phlx’s Foreign Currency Options Participants, for example, have traded on the Exchange since the early 1980’s.

<sup>23</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> On May 30, 2000, the Exchange submitted a new Form 19b-4, which replaces and supersedes the original filing in its entirety (“Amendment No. 1”).

<sup>4</sup> See Letter from Carla Behnfeldt, Counsel, Phlx, to Sonia Patton, Staff Attorney, Division of Market Regulation, Commission, dated July 11, 2000 (“Amendment No. 2”). Amendment No. 2 makes certain clarifying changes to the Exchange’s summary of comments received from members, participants, and others set forth in Section II.C. of this notice. The substance of Amendment No. 2 has been incorporated into this filing.

Equity Trading Permits ("ETPs"). The text of proposed Rule 23 is as follows. All language is being added.

#### Rule 23

##### Equity Trading Permits—

(a) *Classes of Equity Trading Permits.* Two classes of Equity Trading Permits ("ETPs") may be issued by the Exchange to applicants pursuant to resolution of the Board of Governors for such fee as may be established from time to time by the Board. The two classes of ETPs shall be Regular ETPs and Off-Floor ETPs, which are collectively referred to as ETPs.

(b) *Requirement for Issuance.* An ETP holder must be at least the minimum age of majority required to be responsible for his contracts in each jurisdiction in which he conducts business, and must meet all qualifications that are required for membership in the Exchange. Applications must be approved by the Exchange, and applicants who are not Exchange members must be admitted by the Exchange. The admissions process for applicants who are not members of the Exchange will be the same as that required for membership applicants for admission, and the decision to grant or deny an application for admission shall be made by the Admissions Committee under its established procedures. No person whose application for an ETP has been approved by the Exchange shall be admitted to the privileges thereof until he shall have signed a pledge to abide by the By-laws and rules of the Exchange as the same have been or shall be from time to time amended and by all rules, regulations, requirements, orders, directions or decisions adopted or made in accordance therewith and submit to the Exchange's disciplinary jurisdiction.

(c) *Rights of ETP Holders.* Except as may be otherwise set forth in this Rule 23 or in other Rules or effective Commission filings, and ETP holder shall have the right to transact business on the floor of the Exchange to the same extent and in the same manner as a member of the Exchange without options privileges and shall be deemed to have the same rights and obligations as a member without options privileges. An ETP holder shall not be entitled to vote in any election or on any amendment to the By-laws or on any other matter, to petition or to be counted as part of a quorum at meetings of members, or to share in any distribution of the assets or funds of the Exchange in the event of any voluntary or involuntary liquidation, dissolution, or winding up of the affairs of the Exchange, or to purchase options privileges. ETP holders are eligible to serve on the Board of Governors and on Exchange committees if elected or appointed and subject to existing qualification requirements for service, to the same extent as members. Specialist members who elect to sell or lease their memberships in favor of Regular ETPs shall continue to be specialists in their allocated securities.

(d) *Limitation on Rights of Off-Floor ETP Holders.* An Off-Floor ETP holder may, if accompanied by a regular member, visit the Floor of the Exchange but shall not have the privilege of transacting business thereon. An

Off-Floor ETP holder shall be authorized to maintain electronic or telephonic access to (i) the floor facilities of a member or member organization or a Regular ETP holder, (ii) the Philadelphia Stock Exchange Automated Communication and Execution System ("PACE") and (iii) such other automated trading systems of the Exchange as may be made available to members of the Exchange without options privileges.

(e) *Obligations of ETP Holders.* An ETP holder shall be subject to such obligations and duties (including the payment of fees and charges of the Exchange) as may be imposed on Exchange members from time to time, provided that ETP holder shall not be subject to annual membership dues, technology fees or capital assessments. All provisions of the Certificate of Incorporation, By-laws and the rules, regulations, requirements, orders, directions and decisions adopted or made in accordance therewith which by their terms are applicable to Exchange members shall be deemed to also apply to ETP holders unless the application thereof shall be inconsistent with the provisions of this Rule 23. All references in such documents to "non-members" shall not be construed to apply to ETP holders.

(f) *Transferability of ETPs.* An ETP may not be transferred by lease, sale, gift, involuntary transfer, or any other means or as collateral to secure any obligation, except that an ETP may be transferred within the holder's ETP organization to (i) an individual who has applied for and been approved by the Admissions Committee as an ETP holder, or (ii) to an "inactive nominee" who is registered as such with the Exchange.

(g) *ETP Organizations.* An individual ETP holder who is associated with a broker-dealer shall qualify such broker-dealer as an ETP firm or an ETP corporation (either, an "ETP organization"). Except as may be otherwise set forth in this Rule 23 or in other Rules or effective Commission filings, an ETP organization shall have the same rights and obligations as a member organization of the Exchange. If the ETP pursuant to which an ETP organization is thus qualified shall terminate, such organization is thus qualified shall terminate, such organization shall cease to be an ETP organization of the Exchange. Every applicant whose fees are to be paid by such ETP organization shall file, along with his or her ETP application, an agreement between the ETP applicant and the ETP organization (an "ETP Use Agreement") which provides that the ETP organization may direct the transfer of the ETP to another qualified individual within the ETP organization and that the ETP holder may not object to such transfer.

(h) *Termination of ETPs.*

(i) *By the Exchange.* An ETP holder may be suspended or expelled on the same basis as a member. The Exchange reserves the right to amend the terms of, to discontinue offering or to terminate existing ETPs of one or more classes at any time upon thirty days written notice.

(ii) *By the ETP Holder.* An ETP holder must provide the Exchange thirty days written notice prior to termination of the ETP. Notice of intent to terminate an ETP shall be given by the Exchange to the membership in the

same manner as notice of a proposed transfer of a membership.

(iii) *Effect of Termination.* The ETP holder and the ETP organization shall remain liable for all obligations incurred as an ETP holder or ETP organization until they are discharged. The Exchange may draw upon any security provided pursuant to Rule 23(i) for the payment of any such obligations at any time if they remain unpaid as of the date of termination. Upon the termination of an ETP, all rights and privileges granted pursuant thereto shall terminate.

(i) *Security For Exchange Fees and Other Claims.*

(i) Each ETP organization shall be required to provide security to the Exchange for the payment of any claims pursuant to By-law 15-3 upon termination of any ETP issued to an individual affiliated with the ETP organization, as though such security were the proceeds for the sale of a membership. This security may consist of:

(A) a deposit with the Exchange in the amount of \$50,000 to be held, together with all other such deposits made pursuant to this rule, in a segregated account, and which may be invested by the Exchange in United States government obligations or any other investments which provide safety and liquidity of the principal invested, interest or income on which deposit shall be paid periodically by the Exchange to such ETP organization;

(B) an acceptable letter of credit from a financial institution acceptable to the Exchange, in the amount of \$50,000, proceeds of which may be applied by the Exchange upon termination of any ETP issued to an individual affiliated with such ETP organization in the same manner as proceeds of membership sales under By-law 15-3; or

(C) an acceptable guaranty by a financial institution acceptable to the Exchange guaranteeing the payment by the ETP organization, upon termination of any ETP issued to any individual affiliated with such organization, of any claims listed in By-law 15-3 up to \$50,000.

(ii) The security required to be provided pursuant to this rule shall not be calculated based upon the number of ETPs issued to affiliates of the ETP organization, but shall be the same regardless of the number of such ETPs issued to its affiliates. At such time as no ETP holders remain associated with the ETP organization, any remaining security shall be released to the ETP organization following payment of claims pursuant to By-law 15-3 and upon execution by the ETP holder and ETP organization of releases satisfactory to the Board of Governors.

(iii) The obligation to provide security pursuant to this rule shall not apply to member organizations or ETP organizations which have been in good standing at the Exchange for the previous year. Any security provided pursuant to this Rule 23(i) shall be returned at such time as the member organization or ETP organization shall have been in good standing for one year.

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

The Exchange proposes to adopt new Rule 23 relating to the issuance by the Exchange of ETPs. Specifically, Rule 23 would govern the terms and conditions of ETPs, which are intended to confer access privileges to the Exchange's equity trading floor.<sup>5</sup> The purpose of the proposed rule change is to reduce the cost of access to the Exchange's equity trading floor and to attract additional order flow and new business and services.

Proposed Rule 23 establishes two classes of ETPs. Regular Equity Trading Permits ("Regular ETPs") authorize their holders to trade equity securities on any facility of the Exchange, in any capacity permitted to members, including as a specialist. Off-Floor Equity Trading Permits ("Off-Floor ETPs") allow holders electronic and telephonic access, but not physical access, to the Exchange floor.

Proposed Rule 23(a) provides that the two classes of ETPs may be issued by the Exchange to applicants pursuant to resolution of the Board of governors ("Board") for such fee as may be established from time to time by the Board.<sup>6</sup>

Proposed Rule 23(b) requires an ETP holder to be at least the minimum age of majority required to be responsible for his contracts in each jurisdiction in which he conducts business, and to meet all qualifications required for Exchange membership. It also requires ETP applications to be approved by the Exchange.

<sup>5</sup> In connection with the proposed rule change, the Exchange is also proposing new Article Twenty-First to the Exchange's Certificate of Incorporation to authorize the issuance of permits to conduct business on the Exchange. See SR-Phlx-00-02. The effectiveness of the proposed rule change is contingent upon the Commission's approval of SR-Phlx-00-02 and the filing of the amendment of the Exchange's Certificate of Incorporation with the Delaware Secretary of State. The Exchange is also proposing to amend its schedule of dues, fees, and charges to provide that the Exchange's existing application fee and initiation fee apply to ETPs, and to impose monthly ETP fees. See SR-Phlx-00-04. Finally, Stock Clearing Corporation of Philadelphia ("SCCP") has proposed a change to its certificate of incorporation and to SSCP Rule 3 pursuant to which SSCP may treat ETP holders as Phlx members for purposes of clearing services it provides. See SR-SCCP-00-01.

<sup>6</sup> The Phlx Board approved the issuance of ETPs pursuant to Rule 23, as well as monthly ETP fees, on October 27, 1999. SR-Phlx-00-04, filed contemporaneously with this filing, requests Commission approval of these fees.

The application process for applicants who are not members of the Exchange would also include an admissions determination by the Exchange's Admissions Committee. The Exchange notes that ETP applicants who are members of the Exchange when they apply for an ETP would have already received a favorable admissions determination by the Exchange's Admissions Committee. With respect to ETP applicants who are not Exchange members, the admissions process would be the same as that currently required in connection with membership applicants, and the decision to grant or deny an applicant for admission as the ETP holder would be made by the Admissions Committee under its established procedures.<sup>7</sup> Proposed Rule 23(b) also requires the applicant to sign a pledge to abide by the By-laws and rules of the Exchange and to submit to the Exchange's disciplinary jurisdiction.

Proposed Rule 23(c) provides that, except as may be otherwise set forth in Rule 23 or in other rules of the Exchange or effective Commission filings, and ETP holder will have the right to transact business on the floor of the Exchange to the same extent and in the same manner, and would be deemed to have the same rights and obligations, as a member of the Exchange without options privileges.<sup>8</sup> It also establishes that an ETP holder would not be entitled by virtue of the ETP to vote in any election or on any amendment to the By-laws or on any other matter, or to petition or to be counted as part of a quorum at meetings of members. ETP holders would, however, be eligible to serve on the Board of Governors and on Exchange committees if elected or appointed and subject to existing qualification requirements for service, to the same extent as members. Because an ETP confers no equity interest in Exchange assets or property, Rule 23(c) establishes clearly that an ETP would not entitle its holder to share in any distribution of the assets or funds of the Exchange in the event of any voluntary or involuntary liquidation, dissolution, or winding up of the affairs of the Exchange, or to purchase options privileges. Finally, Rule 23(c) provides that specialist members who elect to sell or lease their memberships in favor of Regular ETPs would continue to be specialists in their allocated securities.

Proposed Rule 23(d) establishes the rights of holders of Off-Floor ETPs. An Off-Floor ETP holder would be able, if accompanied by a regular member, to visit the floor of the Exchange, but we would not have the privilege of transacting business on it. Consequently, and Off-Floor ETP holder

<sup>7</sup> Phlx Rule 901, Denial of and Conditions of Membership, sets forth certain criteria for membership decisions which would also apply to any determination to issue an ETP to an applicant who is not already a Phlx member.

<sup>8</sup> The Commission has in the past approved the Exchange's issuance of Foreign Currency Options Participations ("FCO Participations"). Like holders of FCO Participations, ETP holders would generally be subject to Phlx's rules and By-laws but would be entitled to all the rights and privileges granted to Phlx members. See Securities Exchange Act Release No. 19134 (Oct. 14, 1982), 47 FR 46949 (Oct. 21, 1982).

would have the same rights as a Regular ETP holder. In particular, an Off-Floor ETP holder be eligible to apply for specialist privileges. With this exception, an Off-Floor ETP holder would be authorized, for the purpose of trading equity securities, to maintain electronic or telephonic access to (i) the floor facilities on the equities floor of the Exchange of a member or member organization or a Regular ETP holder, (ii) the Philadelphia Stock Exchange Automated Communication and Execution System ("PACE"),<sup>9</sup> and (iii) such other automated trading systems of the Exchange as may be made available to members of the Exchange without options privileges.

Proposed Rule 23(e) establishes the ability of the Exchange to impose fees and charges on EIP holders. An EIP holder would be subject to the same obligations and duties (including the payment of Exchange fees and charges) imposed on Exchange members, except that EIP holders would not be charged annual membership dues, technology fees, or any capital assessments that could be imposed in the future.<sup>10</sup> Rule 23(e) establishes that all provisions of the Exchange's Certificate of Incorporation and By-laws, and the rules, regulations, requirements, orders, directions and decisions adopted pursuant to them which by their terms are applicable to Exchange members would also apply to ETP holders unless their application is inconsistent with the provisions of Rule 23. Likewise, all references in such documents to "non-members" would not be construed to apply to ETP holders. Consistent with proposed Rule 23(e), Phlx intends to charge a \$200 application fee for every ETP application made by members and non-members. Non-member applicants for ETPs would also be required to complete the same admissions process required by the Exchange for membership applicants, and would be charged the \$1,500 initiation fee upon issuance of the ETP just as members are charged this fee upon election to membership. After an ETP is issued, its holder would be subject to the same fees as Phlx members (except as otherwise noted in proposed Rule 23(e)) in addition to a monthly ETP fee.<sup>11</sup>

Proposed Rule 23(f) makes clear that, unlike a membership, an ETP may not be transferred by lease, sale, gift, involuntary transfer, or any other means or as collateral to secure any obligation, except that an ETP may be transferred within the holder's ETP organization to (i) an individual who has applied for and been approved by the

<sup>9</sup> PACE is the Exchange's automatic order routing and execution system on the equity trading floor. PACE accepts orders for manual and automatic execution in accordance with the provisions of Rule 229, which governs the PACE System and defines its objectives and parameters.

<sup>10</sup> In particular, they would not be subject by virtue of the ETP to the Exchange's \$1,500 capital funding fee. See Securities Exchange Act Release No. 42993 (June 29, 2000), 65 FR 42415 (July 10, 2000). Fees proposed to be assessed by the Exchange with respect to ETPs are described in SR-Phlx-00-04.

<sup>11</sup> See SR-Phlx-00-04, filed concurrently with this proposed rule change, which requests approval of monthly ETP fees.

Admissions Committee as an ETP holder, or (ii) an "inactive nominee" registered as such with the Exchange.

Proposed rule 23(g) provides that an individual ETP holder associated with a broker-dealer would be required to qualify such broker-dealer as an ETP firm or an ETP corporation just as a member would register it as a member firm or member corporation under current Exchange rules.<sup>12</sup> Except to the extent otherwise set forth in Rule 23 or in other Exchange rules or effective Commission filings, an ETP organization would have the same rights and obligations as a member organization of the Exchange. The organization would cease to be an ETP organization of the Exchange upon termination of the ETP pursuant to which the ETP organization is qualified.

Proposed Rule 23(g) also requires every ETP applicant whose fees are to be paid by such ETP organization to file, along with his or her ETP application, an agreement between the ETP applicant and the ETP organization (an "ETP Use Agreement") providing that the ETP organization may direct the transfer of the ETP to another qualified individual within the ETP organization and the ETP holder may not object to such transfer. The ETP Use Agreement is in some respects analogous to the A-B-C Agreement provided for in Exchange Rule 930 pursuant to which a member contributes the use of a membership to the membership organization. Like the A-B-C Agreement provided for in Rule 940, the ETP Use Agreement would restrict the use of the ETP by its holder in the event of the holder's termination of his association with the ETP organization.<sup>13</sup>

Proposed Rule 23(h) permits the Exchange to suspend or expel an individual ETP holder on the same basis as a member. It also permits the Exchange to amend the terms of, to discontinue offering or to terminate existing ETPs of one or more classes at any time upon thirty days written notice. Similarly, proposed Rule 23(h) requires an ETP holder to provide the Exchange thirty days written notice prior to termination of the ETP. The Exchange is required to provide notice of an ETP's termination to the membership in the same manner it provides notice of a proposed transfer of a membership. The ETP holder would remain liable for all obligations incurred as an ETP holder until these obligations are discharged, and the Exchange is authorized to draw upon any security provided pursuant to Rule 23(i), discussed below, for the payment of such obligations at any time if they remain unpaid as of the date of termination.

Proposed Rule 23(i) requires ETP organizations to provide acceptable security for payment of any claims pursuant to By-law 15-3 upon termination of an ETP. The security requirement may be met, at the option of the ETP organization, by providing a letter of credit or other guaranty acceptable

to the Exchange, or by depositing \$50,000 with the Exchange to be held in a segregated account with all other such deposits and held by the Exchange as security.<sup>14</sup> The security required is the same for each ETP organization, regardless of the number of ETPs issued to its associated persons, and is unrelated to any security requirement established by SCCP.<sup>15</sup> The requirement does not apply to member organizations or ETP organizations that have been in good standing at the Exchange for the previous year. Consequently, ETP organizations in good standing for one year after providing such security will be entitled to its return, subject to any prior or pending claims. Finally, proposed Rule 23(i) makes clear that at such time as no ETP holders remain associated with the ETP organization, the Exchange shall release any remaining security following payment of claims pursuant to By-law 15-3 and upon execution by the ETP holder and ETP organization of releases satisfactory to the Board of Governors.

The Exchange expects to first undertake the ETP offering by distributing an informational circular and an ETP Application Form to be completed and returned to the Exchange together with payment of the Exchange's application fee.<sup>16</sup> In addition to the ETP Application Form, applicants who are not Exchange members will be required to supply to the Admissions Committee all information required for that Committee to make an admissions determination under its established procedures, as discussed above.

## 2. Statutory Basis

The proposed rule change is consistent with section 6(b) of the Act<sup>17</sup> in general, and furthers the objectives of section 6(b)(5)<sup>18</sup> in particular, in that it is designed 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. The proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers or dealers. Specifically, the proposed rule change will

increase the range of options available to persons seeking access to the Exchange's equity floor. ETPs should help facilitate transactions by allowing more broker-dealers direct access to the Phlx equity market and attracting greater order flow. The proposal is intended to enhance the depth and liquidity of the Phlx equity market by bringing additional capital and market participants to the trading floor. Providing holders of ETPs with direct access to the Phlx equity floor should assist public customers in getting the best execution of their orders by providing them with additional firms through which orders to the Phlx can be routed.

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

The Phlx does not believe that the proposed rule change will impose any inappropriate or unnecessary burden on competition. On the contrary, the Exchange believes that the proposed rule change will enhance competition among Exchange members and between the Exchange and other markets.

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

Although written comments were not solicited from members, participants, or others on proposed Rule 23, the Exchange issued a circular dated September 27, 1999 that announced certain action taken at the September 1999 Phlx Board meeting. These actions included approval of changes to Phlx's Certificate of Incorporation authorizing permits and invited telephone comments to the Chairman of the Board. The Exchange also issued a circular dated October 28, 1999, announcing Board approval of proposed Rule 23. The Exchange received 17 written comments concerning the concept of trading permits generally and equity trading permits in particular, including one undated petition received on November 12, 1999, from 19 owners and members.<sup>19</sup> A number of comments were

<sup>14</sup> The Exchange does not believe that filing with the Commission for approval of each determination it makes regarding the acceptability of a particular form of or issuer of a letter of credit or guaranty will be required. Nevertheless, the Exchange currently intends that financial institutions that are approved to issue letters of credit as margin for foreign currency options pursuant to existing Phlx Rule 722(h) will be acceptable institutions for purposes of issuing guarantees or letters of credit under proposed Rule 23(i).

<sup>15</sup> See SCCP Rule 4.

<sup>16</sup> The Exchange will not accept ETP Applications or application fees until the ETP proposal is approved by the Commission. It may, however, circulate informational circulars regarding the proposed ETP program prior to such approval. Further, the Exchange may elect to commence offering Regular ETPs prior to offering Off-Floor ETPs, in which case the ETP Application Forms would be modified accordingly by deleting the reference to Off-Floor ETPs, which reference would be reinserted when Off-Floor ETPs are made available by the Exchange.

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

<sup>18</sup> 15 U.S.C. 78f(b)(5).

<sup>19</sup> Letter dated October 4, 1999 from Isabelle Benton ("Benton Letter"); Letter dated October 16, 1999 from Mark F. Desiderio, Esq. to the Commission ("Desiderio Letter"); Letter dated October 4, 1999 from Doris D. Elwell to Chairman Arthur Levitt, Commission ("Elwell Letter"); Letter dated October 28, 1999 from Harry Green ("First Green Letter"); Letter dated November 3, 1999 from Harry Green ("Second Green Letter"); Letter dated October 1, 1999 from Karen D. Janney ("Janney Letter"); E-mail dated July 8, 1999 from William J. Kramer ("First Kramer E-mail"); E-mail dated October 6, 1999 from William J. Kramer ("Second Kramer E-mail"); E-mail dated August 17, 1999 from Robert Leff ("First Leff E-mail"); E-mail dated December 16, 1999, from Robert Leff ("Second Leff E-mail"); Letter dated September 23, 1999 from PBL Partners, LLC ("PBL Letter"); Letter dated September 28, 1999 from George E. Snyder III ("Snyder Letter"); Undated petition received on November 12, 1999, from George E. Snyder III and 18 other owners and members ("Petition"); Letter dated July 20, 1999 from Stephen J. Taylor Jr. ("Taylor Letter"); E-mail dated August 24, 1999 from Steve Taylor ("Taylor E-mail"); Letter dated July 22, 1999 from Matthew D. Wayne, Esq. ("Wayne Letter"); and Letter dated September 23,

<sup>12</sup> Like Exchange members, an ETP holder would be required to be associated with a registered broker-dealer.

<sup>13</sup> The A-B-C Agreement contains additional provisions arising from the division of equitable and legal title to membership, a concept which is inapplicable to ETPs.

critical of the proposal without stating the basis of the criticism.<sup>20</sup> The principal substantive comments are discussed below.

The majority of the commenters were seat owners predicting, and objecting to, a decline in seat prices and dilution in the value of memberships as a result of the issuance of permits.<sup>21</sup> Certain commenters predicted lawsuits against the Exchange if ETPs were issued,<sup>22</sup> and one commenter stated that a campaign to hurt one lessor in particular has "blinded" people.<sup>23</sup> Another commenter suggested that if they are issued, ETPs should be "phased in."<sup>24</sup> The Exchange has determined in its business judgment, however, that the potential benefits to the Exchange of the trading permits, including the potential for increased access and enhanced competition on the trading floor and the opportunity to attract additional order flow and new business, justify any possible dilution of memberships and may, in the longer term, result in higher prices for regular memberships. The Exchange is also of the view that the benefits of the ETP program to the Exchange are such that a phasing-in approach would not be desirable. The Exchange further believes that it is proceeding appropriately with respect to ETPs and that any lawsuit of the kind alluded to by certain commenters would be groundless. The Exchange believes that ETPs are in the best interests of the Exchange and its membership as a whole (including both lessee members and lessor owners), and notes that the Exchange's stated purpose in Article Third of its Certificate of Incorporation is "[t]o act as and to provide a securities exchange where [its] members and other persons authorized it" can deal in securities.

The Petition submitted by George E. Snyder III demanded that any proposed rules regarding the issuance of trading permits be put to a vote of owner-members. One comment letter stated that seat owners should be eligible to vote on all issues that come before the membership,<sup>25</sup> and another stated that creation of ETPs requires a membership vote.<sup>26</sup> However, neither the Certificate of Incorporation nor the By-laws require a vote to be taken by either seat owners or members on the subject of issuance of trading permits. Further,

1999, enclosing an outline of remarks delivered by Matthew D. Wayne on behalf of Paul Liang at the September 22, 1999 Phlx Board of Governors meeting ("Liang Letter"). A number of these written comments dealt generally with both trading permits and the Exchange's proposed capital funding fee and were filed with the Commission on October 27, 1999 in connection with SR-Phlx-99-43, the Exchange's original proposed rule change regarding the capital funding fee.

<sup>20</sup> See e.g. PBL Letter (stating without elaboration that issuing ETPs is flawed on both business and legal grounds).

<sup>21</sup> See Benton Letter, Elwell Letter, First and Second Green Letters, Janney Letter, Snyder Letter dated July 20, 1999, Taylor Letter, Wayne Letter, and First and Second Leff E-mails.

<sup>22</sup> See Benton Letter, Wayne Letter, and First Kramer E-mail.

<sup>23</sup> See Second Kramer E-mail.

<sup>24</sup> See Taylor Letter and Taylor E-mail.

<sup>25</sup> See Second Green Letter.

<sup>26</sup> See Liang Letter.

practically all voting rights are vested in "members"<sup>27</sup> rather than seat owners under Phlx's Certificate Incorporation and By-laws.<sup>28</sup>

One commenter stated that the Exchange's Certificate of Incorporation and By-law do not permit the creation of ETPs, and that creation of ETPs requires a By-law amendment.<sup>29</sup> The Exchange believes that the Certificate of Incorporation already permits ETPs, and that a By-law amendment is therefore not required.<sup>30</sup> The Exchange notes that the amendment to the Certificate of Incorporation proposed in Article Twenty-First would clearly authorize permits in any event and would supersede any inconsistent provision in the By-laws as a matter of basic corporate law.

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

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

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

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

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying

<sup>27</sup> In this instance, the term "member" refers to the holder of legal title of the seat.

<sup>28</sup> See, Article Thirteenth of the Exchange's Certificate of Incorporation and Phlx By-law Article XII, Section 12-6. Seat owners, (i.e., holders of "equitable" title to an Exchange membership) are entitled to vote in any decision relating to a compromise or arrangement between the Phlx and its creditors or its members, or relating to a reorganization of the Phlx. Other voting rights belong to the members (i.e., holders of legal title to an Exchange membership).

<sup>29</sup> See Liang Letter.

<sup>30</sup> As noted above, the Exchange's stated purpose in Article Third of its Certificate of Incorporation is "[t]o act as and to provide a securities exchange where [its] members and other persons authorized by it" can deal in securities. Phlx's Foreign Currency Options Participants, for example, have traded on the Exchange since the early 1980's.

at the principal office of the Phlx. All submissions should refer to File No. SR-Phlx-00-03 and should be submitted by September 22, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>31</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43213; File No. SR-Phlx-00-04]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to the Issuance of Equity Trading Permits and Establishment of Related Fees and Amendment No. 1 Thereto

August 25, 2000.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 12, 2000, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On May 30, 2000, the Exchange filed Amendment No. 1 to the proposal.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its schedule of dues, fees and charges in connection with its proposal to issue equity trading permits. A copy of the proposed schedule is available at the Exchange and at the Commission.

<sup>31</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See Letter from Carla Behnfeldt, Counsel, Phlx, to Sonia Patton, Attorney, Division of Market Regulation, Commission, dated May 25, 2000. ("Amendment No. 1"). In Amendment No. 1, among other things, the Exchange clarified the circumstances under which, and to whom, the Application Fee and the Initiation Fee will be charged.