

Chairman of the Exchange. The Exchange believes that this will permit its management, acting with key members of the Allocation Committee, to oversee directly the introduction of the UTP concept to the NYSE. The Commission believes that it is appropriate to establish a new allocation committee for ETFs because of the unique characteristics of ETFs, which should be considered in the allocation process.

The Exchange proposes that member organizations applying to trade ETFs on a UTP basis be able to demonstrate certain abilities in addition to the current performance and disciplinary requirements of the allocation application. For example, the applicant must have: (a) an understanding of the trading characteristics of ETFs; (b) expertise in the trading of derivatively-priced instruments; (c) the ability and willingness to engage in hedging activity as appropriate; (d) the knowledge of other markets in which the ETF which is to be allocated trades; and (e) the willingness to provide financial and other support to relevant Exchange publicity and educational initiatives. The Commission finds that these criteria are suitable for the Committee to rely on when allocating an ETF to a particular specialist unit.

In addition, the Exchange proposes to prohibit a specialist in any component security of the ETF to function as a specialist in the ETF in order to avoid "wash sales." The Exchange, however, proposes to allow specialists in a component security of an ETF to use a separate member organization to function as an ETF specialist so long as NYSE Rule 98 information barriers are established and approved by the Exchange. The Commission believes that NYSE Rule 98 information barriers should prevent the flow of any privileged and/or nonpublic information between the related entities and should reduce the potential for any concerns regarding "wash sales" in this context.

Because the proposed rule change, as amended, institutes a new process for allocating ETFs to NYSE specialist units and because the Commission is adopting the proposal on an accelerated basis, the Commission believes that the proposal should be approved on a pilot basis, for a one-year period ending on May 7, 2002, to ensure that the process is effective and fair. The Commission expects the NYSE to report to the Commission about its experience with the new allocation process in any future proposal it files to extend the amendment to the Policy or approve it on a permanent basis.

The Commission, pursuant to Section 19(b)(2) of the Act,<sup>13</sup> finds good cause for approving the proposed rule change and Amendment No. 1 thereto, on a one-year pilot basis through May 7, 2002, prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Commission notes that granting accelerated approval to this proposal will allow the NYSE to immediately implement a process for allocating ETFs to be traded on the Exchange on a UTP basis to specialist units. It is necessary to allocate the ETFs to specialist units as soon as possible so that the specialists so appointed will have ample time to prepare for NYSE's upcoming listing and trading of ETFs on a UTP basis. Amendment No. 1 simply makes minor technical corrections to the proposed rule text and clarifies that approved persons of a specialist must be granted an exemption from specified specialist rules pursuant to NYSE Rule 98.

## V. Conclusion

It is therefore Ordered, pursuant to Section 19(b)(2) of the Act,<sup>14</sup> that the proposed rule change (SR-NYSE-2001-07), as amended, is hereby approved on an accelerated basis through May 7, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44285; File No. SR-Phlx-2001-02]

### Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Codifying Formal Procedures for Members To Submit Proposals To List Option Classes on the Exchange

May 9, 2001.

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 11, 2001, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the

proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Phlx. The Phlx filed amendment Nos. 1<sup>3</sup> and 2<sup>4</sup> to the proposed rule change on February 21, 2001 and May 2, 2001, respectively. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Phlx proposes to amend Exchange Rule 1009 to codify and implement procedures to be carried out when an Exchange member, member organization, or other person requests that the Exchange list options not currently traded on the Exchange. The proposed rule change is set forth below. New text is in *italics*.

\* \* \* \* \*

### Criteria for Underlying Securities

Rule 1009. (a)-(c) No change.

#### Commentary

.01 No change

.02 *(a) Members, member organizations or any person proposing to list any option not currently listed on the Exchange shall submit a form of request (a "Request to List an Option"), available from the Exchange's Business and Operations Planning Department (BOP), to BOP staff.*

*(b) As soon as practicable, but not later than three (3) business days following receipt of the Request to List an Option, BOP staff shall review the proposed option's eligibility for listing, using the objective listing criteria set forth in Commentary .01 of this Rule. If BOP staff determines that the proposed option does not meet the objective*

<sup>3</sup> See letter from Richard Rudolph, Counsel, Phlx, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated February 20, 2001 ("Amendment No. 1"). Among other things, Amendment No. 1 clarifies that the Exchange: (i) may consider bona fide business interests in determining whether to list an option; (ii) must send letters to members setting forth in reasonable detail the basis on which a decision not to list a proposed option was made; and (iii) must forward its written response within 3 business days of its determination to deny a proposed listing.

<sup>4</sup> See letter from Richard Rudolph, Counsel, Phlx, to Nancy Sanow, Assistant Director, Division, Commission, dated May 1, 2001 ("Amendment No. 2"). Amendment No. 2 revises Section (c)(ii) of proposed Commentary .02 to Phlx Rule 1009 to clarify that the Exchange must notify the member in writing if the Exchange determines not to list, or to place conditions or limitations upon, a proposed listing. Amendment No. 2 also amends Section (e) of proposed Commentary .02 to clarify that the Exchange will maintain a record of any bona fide business interests supporting a decision not to list, or to place conditions or limitations upon, a proposed listing.

<sup>13</sup> 15 U.S.C. 78s(b)(2).

<sup>14</sup> *Id.*

<sup>15</sup> 17 CFR 200.30-2(a)(12).

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

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

listing criteria set forth in Commentary .01 of this Rule, BOP staff shall prepare a responsive form (a "Notification Memorandum") stating the reason(s) why the proposed option is not eligible for listing. BOP staff shall forward the Notification Memorandum to the member or member organization that submitted the Request to List an Option within three (3) business days of its determination that the proposed option does not meet objective listing criteria. BOP staff shall maintain all Requests to List an Option and Notification Memoranda in a central file for a period of not less than five (5) years.

(c) If BOP staff determines that the proposed option meets the objective listing criteria set forth in Commentary .01 of this Rule, BOP staff shall present the initial Request to List an Option and the subsequent review to the Chairman of the Board of Governors or his designee, who shall, within ten (10) business days of receipt of the Request to List an Option, instruct BOP staff to:

(i) solicit options specialists to submit applications for specialist privileges in the option; or

(ii) within three (3) business days, prepare and forward a letter to the member or member organization that submitted the Request to List an Option, setting forth in reasonable detail the basis on which the decision not to list, or to place limitations or conditions upon, the proposed option was made.

(d) In considering underlying securities, the Exchange shall ordinarily rely on information made publicly available by the issuer and/or the markets in which the security is traded.

(e) In determining whether to list an option that otherwise meets objective listing criteria, the Chairman of the Board of Governors or his designee may consider such factors as the Exchange's current and projected computer capacity, and the current and projected demands for that capacity, including telecommunications and Option Price Reporting Authority ("OPRA") inbound and outbound message capacity or message volume restrictions placed on the Exchange by OPRA; the projected likely number of series and open interest in the option; the projected likely volatility of the option; the projected likely liquidity of the option; name recognition of the option or underlying security; the projected volume of trading in the option that is likely to occur on the Exchange; the projected share of total trading in the option that is likely to occur at the Exchange; whether any intellectual property right or license thereof exists with respect to the option; whether the proposal is consistent with Exchange

rules and/or the Securities Exchange Act of 1934 and the rules, regulations, and orders thereunder; whether unusual or unfavorable market conditions exist with respect to the option; and whether it is in the bona fide business interest of the Exchange to list the option. If, in denying a request or approving a request subject to conditions or limitations, the Exchange relies upon a factor of other bona fide business interests, the Exchange shall, in addition to providing the member with a written response specifying that the Exchange has relied upon other bona fide business interests, maintain a record of the bona fide business interests supporting its decision.

.03-.05 No change.

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## **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 purpose of the proposed rule change is to establish a procedure to be followed when an Exchange member requests the Exchange to list options not currently traded on the Exchange.<sup>5</sup> The proposed changes to Commentary .02 to Exchange Rule 1009 address member requests to list options and would apply to members and member organizations. In a separate filing, the Exchange also proposes to include these procedures in the Exchange's Codes of Conduct<sup>6</sup> so that these procedures would be

<sup>5</sup> As part of a settlement of an enforcement action by the Commission, four of the five options exchanges, including the Phlx, are required to adopt rules to codify listing procedures to be carried out when a member or member organization requests the exchange to list options not currently trading on the exchange. See Order Instituting Public Administrative Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions. Securities Exchange Act Release No. 43268 (September 11, 2000).

<sup>6</sup> See Securities Exchange Act Release No. 44057 (March 9, 2001), 66 FR 15312 (March 16, 2001) (SR-Phlx-01-03).

applicable to, and violations thereof enforceable against, Exchange officers, directors, governors, employees, committee members, or agents.

The proposed rule change would require members, member organizations or any person proposing to list any option not currently listed on the Exchange to submit a form of request ("Request to List an Option"), available from the Exchange's Business and Operations Planning Department ("BOP"), to BOP staff. The purpose of this provision is to provide a uniform process, format, and record of requests for the listing of options not currently listed on the Exchange.

As soon as practicable, but not later than three business days following receipt of the Request to List an Option, BOP staff would be required to review the proposed option's eligibility for listing, using the objective listing criteria for underlying securities set forth in Commentary .01 of Phlx Rule 1009 for equity options, and the objective criteria set forth in Exchange Rule 1009A for underlying securities for index options.

The three-day period within which the BOP staff must review the Request to List an Option is intended to provide a reasonably prompt timeframe within which to determine if the securities underlying the proposed option meet the Exchange's objective listing criteria. If the BOP staff determines that the securities underlying the proposed option do not meet the objective listing criteria set forth in Commentary .01, they would be required to prepare a responsive form (a "Notification Memorandum") stating the reason(s) why the requested option is not eligible for listing. BOP staff would be required to forward the Notification Memorandum to the member or member organization that submitted the Request to List an Option within three days of the determination that the requested option does not meet the objective listing criteria. This provision is intended to provide a prompt response to the requesting member or member organization of the requested option's ineligibility for listing based on the Phlx's listing standards. The Exchange would be required to maintain all Requests to List an Option and Notification Memoranda in a central file for at least five years.<sup>7</sup>

A determination by the BOP staff that the securities underlying a proposed option meet objective listing criteria

<sup>7</sup> See Securities Exchange Act Rule 17a-1(b). The Exchange would be required to maintain these records for the first two years in an easily accessible location.

would not require the Exchange to list the option. The proposed rule contemplates a variety of legitimate business reasons why the Exchange would choose not to list certain proposed options. If BOP staff determines that the proposed option meets the Exchange's objective listing criteria set forth in Commentary .01 of Phlx Rule 1009, BOP staff would be required to present the proposal to the Chairman of the Board of Governors or his designee<sup>8</sup> within ten business days of the determination. The Chairman or his designee would be required to instruct BOP staff either to: (i) Solicit options specialists to submit applications for specialist privileges in the option; or (ii) within three business days, prepare and forward a letter to the member that submitted the listing proposal, setting forth in reasonable detail the basis on which the decision not to list, or to place limitations or conditions upon, the proposed option was made. These letters would be maintained in a central file for a period of not less than five years. If the Exchange decides to list the requested option, it would forward a Notification Memorandum advising the requesting member that they will be notified when applications for trading privileges in the requested option are solicited.

In determining whether to list an option that otherwise meets objective listing criteria, the Chairman of the Board of Governors or his designee would consider: (i) The Exchange's current and projected computer capacity or message volume restrictions placed on the Exchange by the Option Price Reporting Authority ("OPRA"), and the current and projected demands for that capacity, including telecommunications and OPRA inbound and outbound message capacity; (ii) the projected likely number of series and open interest in the option; (iii) the projected likely volatility of the option; (iv) the projected likely liquidity of the option; (v) name recognition of the option or underlying security; (vi) the projected volume of trading in the option that is likely to occur on the Exchange; (vii) the projected share of total trading in the option that is likely to occur on the Exchange; (viii) whether any intellectual property right or license thereof exists or would be required with respect to the option; (ix) whether the proposal is consistent with Exchange rules and/or the Act and the rules, regulations, and orders thereunder; (x) whether unusual or unfavorable market conditions exist

with respect to the option; and (xi) whether it is in the *bona fide* business interest of the Exchange to list the option. If, in denying a request or approving a request subject to conditions or limitations, the Exchange relies upon a factor of other bona fide business interests, the Exchange would be required, in addition to providing the member with a written response specifying that the Exchange has relied upon other bona fide business interests, to maintain a record of the bona fide business interests supporting its decision. According to the Phlx, the proposed provisions codify the list of legitimate business concerns normally reviewed when the Exchange makes a decision about whether to list an option that otherwise meets its listing criteria.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act<sup>9</sup> in general and furthers the objectives of Section 6(b)(5)<sup>10</sup> in particular in that it is designed to promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and protect investors and the public interest by providing a uniform process for members to submit, and the Exchange to review, listing proposals.

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

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

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

The Phlx did not solicit or receive written comments on the proposed rule change.

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

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

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

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

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies 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 filings will be available for inspection and copying at the principal office of the Phlx. All submissions should refer to the File No. SR-Phlx-2001-02 and should be submitted by June 5, 2001.

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

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

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## DEPARTMENT OF STATE

[Public Notice 3661]

### Shipping Coordinating Committee; Notice of Meeting

The Shipping Coordinating Committee will conduct an open meeting at 9:30 a.m. on Wednesday June 13, 2001, in room 6103, U. S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC. The purpose of the meeting is to prepare for the 47th session of the Subcommittee on Safety of Navigation (NAV) of the International Maritime Organization (IMO) which is scheduled for July 2-6, 2001, at the IMO Headquarters in London.

Items of principal interest on the agenda are:

—Routing of ships, ship reporting and related matters

<sup>8</sup> Such designee may be a member of the Exchange's Board of Governors or a member of the Exchange's Senior Staff.

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

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> 17 CFR 200.30-3(a)(12).