

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44740; File No. SR-Phlx-2001-61]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Solicited Orders and Anticipatory Hedging Activity

August 23, 2001.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 10, 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. On August 7, 2001, the Phlx submitted to the Commission Amendment No. 1 to the proposed rule change.³ The proposed rule change, as amended, has been filed by the Phlx as a "non-controversial" rule change under Rule 19b-4(f)(6) under the Act.⁴ 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 Phlx proposes to amend Phlx Rule 1064, "Crossing, Facilitation and Solicited Orders" by: (1) Amending Phlx Rule 1064(c) to permit a member or member organization representing an order ("originating order") to solicit another member, member organization, or non-member broker-dealer outside the trading crowd to participate in a transaction with the originating order provided that certain specified procedures are followed; and (2) adopting new Phlx Rule 1064(d) to prohibit a member or person associated with a member from using non-public information regarding crossing, facilitation, and solicited orders for the

member's benefit by trading in the underlying stock or in related instruments prior to exposing the order to the trading crowd. The Phlx is also proposing corresponding changes to Options Floor Procedure Advice ("OFPA") B-11(c) and (d) and a conforming amendment to OFPA C-7.

The text of the proposed rule change is available at the Phlx and at the Commission.

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 Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The purpose of the proposed rule change is to set forth specific procedures and guidelines to be followed respecting solicited orders, and to prohibit the use of non-public information received during the crossing, facilitation, and solicitation processes.

a. *Solicited Orders.* Currently, Phlx Rule 1064(c) provides that, if a member appears in the trading crowd in response to a solicitation, other trading crowd participants must be given a reasonable opportunity to respond to the order which prompted the solicitation before the solicited member may respond to the order. The proposed rule change would add paragraph (c)(ii) to the current rule and to OFPA B-11 to permit a member or member organization representing an originating order to solicit another member, member organization, or non-member broker-dealer outside the trading crowd ("solicited party") to participate in the transaction on a proprietary basis, provided, however, that the trading crowd is given an opportunity to participate in the transaction by matching or improving the terms of the transaction.

Proposed Phlx Rule 1064(c)(ii) and OFPA B-11(c)(ii) further set forth the procedures to be followed when an Exchange member solicits another

member, member organization, or non-member broker-dealer outside the trading crowd. The rule would require the member representing the originating order, upon entering the trading crowd to execute the transaction, to: (a) Announce to the trading crowd the same terms of the originating order that were disclosed to the solicited party; (b) bid at the price he/she is prepared to buy from the solicited party or offer at the price he/she is prepared to sell to the solicited party; and (c) give the trading crowd a reasonable opportunity to accept the bid or offer. If a member in the trading crowd decides to match or improve the terms of the transaction, the proposed rule would grant such member in the trading crowd priority over the solicited party.

In order to ensure full disclosure of such orders, proposed Phlx Rule 1064(c)(iii) and OFPA B-11(c)(iii) would require that the word "Solicited" be written clearly and legibly on the order ticket of the solicited order.

The purpose of proposed Phlx Rule 1064(c)(ii) and OFPA B-11(c)(ii) is to allow an Exchange member representing an options order to solicit a third party outside the trading crowd. The member, however, would still have the obligation to represent the originating order to the trading crowd prior to execution.

The purpose of the proposed provision requiring an Exchange member representing a solicited order to announce the terms of the order to the trading crowd prior to executing that order is to ensure that the members of the trading crowd have a reasonable opportunity to participate in the transaction by improving or matching the proposed price.

In addition, this provision would benefit the customer whose order is represented by the soliciting member by allowing for the possible improvement of the ultimate price at which such an order is executed.

The Exchange believes that granting members in the trading crowd priority over the solicited party should ensure that crowd members that wish to participate in such a transaction are given a reasonable opportunity to do so. The Exchange believes that full disclosure to the trading crowd of the terms of orders that comprise solicited transactions allows the trading crowd to give full consideration to, and the opportunity for improvement of, such terms.

b. *Prohibition Against Anticipatory Hedging.* Proposed Phlx Rule 1064(d) and OFPA B-11(d) would expressly prohibit any member or person associated with a member who has knowledge of the material terms and

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Richard S. Rudolph, Counsel, Phlx, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated August 6, 2001. The substance of Amendment No. 1 is incorporated in the description of the proposed rule change in Section II below. For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C), the Commission considers that period to commence on August 7, 2001, the date the Phlx filed Amendment No. 1.

⁴ 17 CFR 240.19b-4(f)(6).

conditions of a solicited order, an order being facilitated, or orders being crossed, the execution of which are imminent, from entering, based on such knowledge, an order to buy or sell an option for the same underlying security; an order to buy or sell the security underlying such class; or an order to buy or sell any related instrument. The prohibition would remain in effect until the terms of such solicited, facilitated, or crossed order are disclosed to the trading crowd, or until the trade can no longer reasonably be considered imminent in view of the passage of time since the order was received.

In order to allow crowd participants to know what constitutes a "related instrument" in reference to an index option, the proposed rule and OFPA clarify that an order to buy or sell a related instrument means, in reference to an index option, an order to buy or sell securities comprising 10% or more of the component securities in the index or an order to buy or sell a futures contract on an economically equivalent index.

The Phlx also proposes new Commentary .01 to Rule 1064 and OFPA B-11, stating that a violation of this rule may be considered conduct inconsistent with just and equitable principles of trade.⁵ The purpose of the proposed rule is to expressly prohibit anticipatory hedging that is based on inside information. The Exchange believes that a codified prohibition, and the proposed Commentary stating that a violation of the rule may be considered conduct inconsistent with just and equitable principles of trade, should function as a deterrent against possible manipulative practices based on inside information.⁶

c. *Conforming Amendment to OFPA C-7.* Currently, OFPA C-7, "Responsibility to Represent Orders to the Trading Crowd," requires that, once

an option order has been received on the floor, it must be represented to the trading crowd before it may be represented away from the crowd.⁷

Phlx is proposing an amendment to OFPA C-7 to provide that, except as otherwise provided in OFPA B-11(c) and Phlx Rule 1064(c), once an option order has been received on the floor, it must be represented to the trading crowd before it may be represented away from the crowd. This would provide Floor Brokers with the ability to solicit third parties outside the trading crowd before representing the order in the trading crowd.

The purpose of this amendment is to maintain consistency in the Phlx's rules and OFPAs concerning orders represented away from the trading crowd.

2. Statutory Basis

The Phlx believes that the proposed rule change, as amended, is consistent with Section 6 of the Act,⁸ in general, and with Section 6(b)(5) of the Act,⁹ specifically, in that it is designed to perfect the mechanisms of a free and open market and the national market system, protect investors and the public interest, and promote just and equitable principles of trade by ensuring that crowd participants are given a reasonable opportunity to participate in, and potentially improve the bids and/or offers of, solicited orders, and by specifically prohibiting anticipatory hedging activity based on inside information.

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

Phlx does not believe that the proposed rule change, as amended, will impose any inappropriate burden on competition.

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

No written comments were solicited or received.

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

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest and does not impose any significant burden on competition and because the Phlx provided the Commission with written notice of its

intent to file the proposed rule change at least five business days prior to the filing date, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁰ and Rule 19b-4(f)(6)¹¹ thereunder.

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of filing.¹² However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest.¹³ The Phlx has requested that the Commission accelerate the operative date of the proposal so that the Exchange may remain competitive with other exchanges that currently have similar rules in effect. The Commission, consistent with the protection of investors and the public interest, has determined to make the proposed rule change operative as of the date August 23, 2001.¹⁴

At any time within 60 days of August 7, 2001, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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, N.W., Washington, D.C. 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change, as amended, that are filed with the Commission, and all written communications relating to the proposed rule change, as amended, 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

⁵ See Phlx Rule 707, stating that a member, member organization, or person associated with or employed by a member or member organization shall not engage in conduct inconsistent with just and equitable principles of trade. Other Phlx rules expressly reference just and equitable principles of trade. See, e.g., Phlx Rules 1015(b), 1042.02 and 1051(a). The Phlx states that the lack of express reference in other Phlx rules should not be construed as waiving the ability to make a violation of Phlx Rule 707 co-exist with any other violation, depending on the facts and circumstances of the case. The Exchange believes that a violation of the existing crossing, facilitation and solicitation provisions of its rules could be a violation of just and equitable principles of trade and could be subject to disciplinary action as such. In addition, the Phlx states a violation of Phlx Rule 1064, OFPA B-11, or OFPA C-7, for instance, can be in and of itself a stand-alone violation.

⁶ The Phlx states that depending on the facts and circumstances surrounding individual cases, anticipatory hedging activity may be a violation of other Phlx rules or rules under the Act.

⁷ See Securities Exchange Act Release No. 24309 (April 7, 1987), 52 FR 11894 (April 13, 1987).

⁸ 15 U.S.C. 78f

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ 15 U.S.C. 78s(b)(3)(A).

¹¹ 17 CFR 240.19b-4(f)(6).

¹² See 17 CFR 240.19b-4(f)(6)(iii).

¹³ *Id.*

¹⁴ For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

the principal office of the Phlx. All submissions should refer to File No. SR-Phlx-2001-61 and should be submitted by September 19, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁵

Margaret H. McFarland,

Deputy Secretary.

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DEPARTMENT OF STATE

[Public Notice 3538]

Department of State Performance Review Board Members (At-Large Board)

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 (At-Large Board) register:

Samuel M. Witten, Assistant Legal Advisor for Law Enforcement and Intelligence, Office of the Legal Advisor, Department of State

Patrick R. Hayes, Executive Director, Bureau of Western Hemisphere Affairs, Department of State

LeRoy Lowery, III, Senior Inspector, Office of the Inspector General, Department of State

Frank E. Moss, Executive Director, Bureau of Consular Affairs, Department of State

Brenda Saunders Sprague, Director, Office of Language Services, Bureau of Administration, Department of State

Christopher Flags, Director, Domestic Financial Service, Bureau of Finance and Management Policy, Department of State

Dated: August 14, 2001.

Alex De La Garza,

Deputy Assistant Secretary, Bureau of Human Resources, Department of State.

[FR Doc. 01-21798 Filed 8-28-01; 8:45 am]

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OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Trade Policy Staff Committee (TPSC): Request for Identification of Private Sector Experts In Electronic Commerce Who May Wish To Participate in the Work of the Free Trade Area of the Americas (FTAA) Joint Government-Private Sector Committee of Experts on Electronic Commerce (Joint E-Commerce Committee)

AGENCY: Office of the United States Trade Representative.

ACTION: Request for identification of private sector experts on electronic commerce.

SUMMARY: The TPSC seeks to identify U.S. private sector experts on issues related to electronic commerce who may be interested in participating in the work of the FTAA Joint E-Commerce Committee. Interested members of the public are invited to submit written notice of their interest and their qualifications.

DATES: Written expressions of interest in participating in the work of the Joint Committee should be submitted no later than noon on September 13, 2001.

ADDRESSES: Expressions of interest (original plus 20 copies) should be submitted to Gloria Blue, Executive Secretary, Trade Policy Staff Committee, Office of the U.S. Trade Representative, 1724 F St., Fifth Floor, NW, Washington, D.C., 20508. Attn: FTAA Joint E-Commerce Committee-Private Sector Participation.

FOR FURTHER INFORMATION CONTACT: For procedural questions concerning public comments, contact Gloria Blue, Executive Secretary, Trade Policy Staff Committee, Office of the United States Trade Representative, (202) 395-3475. All other questions concerning the Joint E-Commerce Committee may be directed to Walter Bastian, Acting Deputy Assistant Secretary for the Western Hemisphere, U.S. Department of Commerce (202) 482-4325, Walter_Bastian@ita.doc.gov.

SUPPLEMENTARY INFORMATION:

1. Background

At the Second Summit of the Americas in April 1998, in Santiago, Chile, the 34 democratically-elected Western Hemisphere leaders initiated negotiations to create the FTAA no later than the year 2005. They established nine negotiating groups, a consultative group, and two non-negotiating committees, one of which is the Joint E-Commerce Committee, which began its

work in August 1998. The trade ministers mandated that both government and private sector experts meet as the Joint E-Commerce Committee to make recommendations on how to increase and broaden the benefits of electronic commerce; the Joint E-Commerce Committee is not a negotiating group.

During 1998-1999, the Government of Barbados chaired the Joint E-Commerce Committee. During 2000-2001, a Uruguayan private sector representative chaired. The Government of Canada is currently chairing the Committee through October 2002 with a Peruvian private sector representative serving as Vice Chair. Acting Deputy Assistant Secretary of Commerce for the Western Hemisphere, Walter Bastian, is leading the U.S. Government-private sector delegation to the Joint E-Commerce Committee.

Status of Work in the Joint Committee: At each of the past two FTAA Ministerial meetings, in Toronto, Canada in November 1999 and Buenos Aires, Argentina in April 2001, trade ministers received, and released to the public, reports prepared by the Joint E-Commerce Committee reflecting the culmination of its discussions over the preceding 18 months on a broad range of electronic commerce issues. The Joint E-Commerce Committee's recommendations on increasing and broadening the benefits of electronic commerce were drafted with the full participation of government and private sector experts from every region in the Hemisphere. FTAA trade ministers committed to share the report and its recommendations with other relevant authorities within their governments. They also instructed the Joint E-Commerce Committee to continue its work as a non-negotiating group and produce further recommendations over the next 18-month period. The "Second Report with Recommendations to Ministers April 9, 2001," is available in English and Spanish on the USTR website (www.ustr.gov), the official FTAA website (<http://www.ftaa-alca.org>) and the U.S. Government Electronic Commerce website (<http://www.ecommerce.gov>).

The Joint E-Commerce Committee met most recently on July 23-24, 2001 in Panama City, Panama. At this meeting, the Joint E-Commerce Committee's government and private sector representatives identified issues to be discussed during the next phase of its work. Over the next year, the Joint E-Commerce Committee will focus on the digital divide (including issues related to access and infrastructure, small and medium sized enterprises, education

¹⁵ 17 CFR 200.30-3(a)(12).