

from the Exchange for the capital contribution of any partner to be withdrawn on less than six months' written notice of withdrawal if the notice of withdrawal is given prior to six months after the capital contribution was first made. The Commission also notes that the amended CHX withdrawal of capital rule is identical or very similar to those of other SROs.<sup>7</sup>

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>8</sup> that the proposed rule change (SR-CHX-98-18) is approved.

For the Commission, by the Division of Market Regulations, pursuant to delegated authority.<sup>9</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 98-24526 Filed 9-11-98; 8:45 am]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-40404; File No. SR-NYSE-98-11]

### Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change To Amend NYSE Rule 97, "Limitation on Members' Trading Because of Block Positioning," To Except Transactions To Facilitate Certain Customer Stock Transactions or to Rebalance a Member's Index Portfolio

September 4, 1998.

#### I. Introduction

On March 30, 1998, the New York Stock Exchange, Inc. ("Exchange" or "NYSE") submitted to the Securities and Exchange Commission ("Commission"), 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> a proposed rule change that would amend Exchange Rule 97 to except transactions made to facilitate certain customer stock transactions or to rebalance a member firm's index portfolio. The proposed rule change was published for comment in the **Federal Register** on May 19, 1998.<sup>3</sup> The Commission received one comment on

the proposal.<sup>4</sup> This order approves the proposed rule change.

#### II. Description of the Proposal

The proposed rule change would amend Exchange Rule 97, "Limitation on Members' Trading Because of Block Positioning," to except transactions that facilitate certain customer transactions in: (i) specific stocks within a basket of stocks; (ii) blocks of stock; and (iii) index component stocks. The proposal also would except a member firm's proprietary transactions made to rebalance the member firm's index portfolio.

Exchange Rule 97 currently prohibits a member firm that holds any part of a long stock position in its trading account, which position resulted from a block transaction it effected with a customer, from purchasing for an account in which the block positioning member firm has a direct or indirect interest, additional shares of such stock on a "plus" or "zero plus" tick under certain conditions for the remainder of the trading day on which the member firm acquired the long position. In particular, the member holding the long position cannot purchase on a "plus tick" if the purchase: (1) would result in a new daily high; (2) is within one half hour of the close; or (3) is at a price higher than the lowest price at which any block was acquired in a previous transaction on that day. Moreover, Exchange Rule 97 precludes the member holding the long position from acquiring a position if it entails a purchase on a zero plus tick of more than 50% of the stock offered at a price higher than the lowest price at which any block was acquired in a previous transaction on that day. Under Exchange Rule 97, the term "block" is defined as a quantity of stock having a market value of \$500,000 or more that was acquired in a single transaction. Exchange Rule 97 was adopted to address concerns that a member firm might engage in manipulative practices by attempting to "mark-up" the price of a stock to enable the position acquired in the course of block positioning to be liquidated at a profit, or to maintain the market at the price at which the position was acquired.

The restrictions in Exchange Rule 97 presently do not apply to transactions that: (i) involve bona fide arbitrage or the purchase and sale (or sale and purchase) of securities of companies involved in a publicly announced

merger, acquisition, consolidation or tender offer; (ii) offset transactions made in error; (iii) facilitate the conversion of options; (iv) are engaged in by specialists in their specialty stocks; or (v) facilitate the sale of a block of stock by a customer. The current exceptions under Exchange Rule 97 permit certain types of purchases that are effected for a permitted purpose, but do not include transactions solely effected to increase the block positioner's position.

The proposed rule change would provide additional exceptions that would apply to purchases made by a block positioning member firm that increase a position to facilitate: (i) the sale of a basket of stocks by a customer;<sup>5</sup> or (ii) an existing customer's order<sup>6</sup> for the purchase of a block of stock, a specific stock within a basket of stocks, or a stock being added to or reweighted in an index, at or after the close of trading on the Exchange. This second proposed provision (Exchange Rule 97(b)(6)) will permit a member organization to position stock to effect a cross with a customer at or after the close. The facilitating transactions effected under proposed Exchange Rule 97(b)(6) must be recorded as such and the transactions in the aggregate may not exceed the number of shares required to facilitate the customer's order for such stock. Finally, the proposal would except proprietary transactions made by a member firm due to a stock's addition to an index or an increase in a stock's weight in an index, provided that the transactions in the aggregate do not exceed the number of shares required to rebalance the member firm's index portfolio.<sup>7</sup>

The Exchange has represented that a member firm's purchases exempted under proposed Exchange Rule 97(b)(6) would remain subject to the limitations on positioning to facilitate customer orders as discussed in Exchange Information Memorandum No. 95-28, "Positioning to Facilitate Customer Orders."<sup>8</sup> These limitations generally preclude a block positioner that has committed to sell securities after the

<sup>5</sup> This provision would extend the current exception that applies to a subsequent facilitation trade of block size (Exchange Rule 97(b)(5)) to a facilitation trade of less than block size provided that the stock was part of a basket of stocks being sold by a customer.

<sup>6</sup> The term "existing customer's order" refers to an already existing order of a customer. Thus, the proposal does not provide an exception for anticipatory hedging. Telephone conversation between Agnes Gautier, Vice President, Market Surveillance, Exchange; Richard Strasser, Assistant Director; and Michael Loftus, Attorney, Division of Market Regulation, Commission (June 25, 1998).

<sup>7</sup> Proposed Exchange Rule 97(b)(7).

<sup>8</sup> See Securities Exchange Act Release No. 35837 (June 12, 1995), 60 FR 31749 (June 16, 1995).

<sup>7</sup> See American Stock Exchange Rule 300, and New York Stock Exchange Rule 313.

<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</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> Securities Exchange Act Release No. 39981 (May 11, 1998), 63 FR 27609 (May 19, 1998).

<sup>4</sup> See Letter from Julius R. Leiman-Carbia, Goldman Sachs & Co., to Jonathan G. Katz, Secretary, Commission, dated June 5, 1998 ("Goldman Letter").

close to a customer at the closing price from being in the market on a proprietary basis after 3:40 P.M. when it has left a portion of its positioning to be executed at the close, and such at-the-close proprietary order can be reasonably expected to impact the closing price.

The Exchange believes the proposed exceptions to facilitate certain customer transactions are appropriate because these types of transactions are effected to accommodate a customer. The Exchange further believes the proposed exception for member firm proprietary transactions related to a stock's addition to, or increased weight in, an index is appropriate because such purchases are usually made at the close of trading to obtain the closing price of the index and therefore are indifferent to the price level so long as it represents the closing valuation.

The proposal also would expand the Rule's Supplementary Material, Section .10, "Definitions," to provide definitions for "basket" and "index." The term "basket" would be defined as a group of 15 or more stocks having a total market value of \$1 million or more.

The Exchange represented that this definition is consistent with the use of "basket" in the definition of program trading that appears in Exchange Rule 80A. The proposal would define "index" as a publicly disseminated statistical composite measure based on the price or market value of the component stocks in a group of stocks. The Exchange believes this definition would preclude the possibility of a firm creating an "index" for the purpose of circumventing the restrictions of the Rule.

### III. Summary of Comments

The Commission received one comment letter on the proposed rule change.<sup>9</sup> The commenter supported the proposal. The commenter argued that the current restrictions prevent NYSE members from effectively accumulating principal positions necessary to facilitate a customer's buying interest in basket and index transactions. The commenter concluded that the proposal would enhance the ability of NYSE members to facilitate customers' basket and index transactions.

### IV. Discussion

For the reasons discussed below, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations under the Act applicable to a national securities exchange. In particular, the Commission

believes the proposed rule change is consistent with the Section 6(b)(5)<sup>10</sup> requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.<sup>11</sup>

Exchange Rule 97 is an anti-manipulative rule designed to limit a member firm's trading for its own account for the remainder of a trading day during which it has positioned a block of stock. As the Exchange notes, Exchange Rule 97 was originally intended to prevent member firms from marking up the price of a stock to ensure that a block of such stock, which the member had acquired that day, could be sold at a profit. Exchange Rule 97 also was intended to prevent manipulative transactions by member firms designed to maintain the market at the price at which a block position was acquired.

Certain types of transactions were excepted from Exchange Rule 97's restrictions. The restrictions on Exchange Rule 97 currently do not extend to transactions that: (i) involve bona fide arbitrage or the purchase and sale (or sale and purchase) of securities of companies involved in a publicly announced merger, acquisition, consolidation or tender offer; (ii) offset transactions made in error; (iii) facilitate the conversion of options; (iv) are engaged in by specialists in their specialty stocks; or (v) facilitate the sale of a block of stock by a customer. These exceptions permit market participants to engage in legitimate business transactions, without raising concerns of abusive market practices that Exchange Rule 97 was intended to address.

The Commission believes the Exchange's proposed rule change likewise excepts certain transactions that will permit legitimate business practices without running afoul of the spirit of Exchange Rule 97. The proposal would except member firm transactions from the restrictions of Exchange Rule 97 if they were made to facilitate customers' transactions in: (i) specific stocks within a basket of stocks; (ii) blocks of stock; and (iii) index component stocks. The proposal also would except a member firm's proprietary transactions if they were made to rebalance the member firm's

index portfolio. However, consistent with the current exceptions to Exchange Rule 97, the proposal does not include transactions solely effected to increase a member firm's position.

By recognizing the innovative trading strategies employed by member firms and the myriad of facilitation services provided to customers, the Commission believes the proposal will ensure that Exchange Rule 97 remains relevant and does not become unnecessarily restrictive. The Commission notes that the Exchange previously amended Exchange Rule 97 in 1991 to revise the definition of "block".<sup>12</sup> Prior to the amendment, the term block was applied to any single stock transaction valued at more than \$200,000. The 1991 amendment revised the dollar threshold to \$500,000. In approving the amendment, the Commission stated that the higher dollar threshold was more relevant and that the previous test was unnecessarily restrictive. The Commission believes the Exchange's current proposal is similar to the 1991 amendment in that it modifies Exchange Rule 97 to maintain its relevancy and prevent it from becoming overly restrictive over time while maintaining the important protections that the rule provides.

As the Exchange notes, notwithstanding the narrow exceptions to Exchange Rule 97 in the proposal, members' facilitation transactions continue to be subject to the limitations on positioning to facilitate customer orders as discussed in Exchange Information Memorandum No. 95-28.<sup>13</sup> In particular, member organizations are required to establish and maintain procedures reasonably designed to review facilitation activities for compliance with Exchange rules and federal securities laws. Moreover, it is incumbent on the Exchange in carrying out its regulatory responsibilities with respect to its members to ensure that proper procedures are in place and that they are being enforced in a manner designed to detect and punish violations of Exchange Rule 97, as well as other applicable Exchange rules and the federal securities laws generally.

### 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-98-11) is approved.

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

<sup>11</sup> In approving this proposed rule change, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>12</sup> See Securities Exchange Act Release No. 29318 (June 17, 1991), 56 FR 28937 (June 25, 1991).

<sup>13</sup> See *supra* note 8.

<sup>14</sup> 15 U.S.C. 78s(b)(2).

<sup>9</sup> See Goldman Letter, *supra* note 3.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 98-24525 Filed 9-11-98; 8:45 am]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-40406; File No. SR-Phlx-98-22]

### Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc., Order Approving Proposed Rule Change and Amendment No. 1 Thereto Relating to Amendments to Phlx Rule 931 Regarding Approved Lessors

September 4, 1998.

#### I. Introduction

On May 18, 1998, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission"), 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> a proposed rule change to amend Phlx Rule 931, "Approved Lessor." On June 8, 1998, the Phlx filed an amendment to the proposal.<sup>3</sup> The proposed rule change and Amendment No. 1 were published for comment in the **Federal Register** on July 15, 1998.<sup>4</sup> No comments were received regarding the proposal.

#### II. Description of the Proposal

The Phlx proposes to make several amendments to Phlx Rule 931. First, the Phlx proposes to amend Phlx Rule 931 to substitute the word "Exchange" for

the word "corporation" throughout the rule. Second, the Phlx proposes to amend Phlx Rule 931(d) to require a lessor who is a natural person to file with the Exchange an attestation as to the source of funds used to purchase the membership. Under Phlx Rule 931(d), as amended, an approved lessor who is not a natural person must file with the Exchange a statement of assets, liabilities and net worth and (1) if a partnership, an executed partnership agreement along with executed Form U-4 for all partners who are natural persons; (2) if a limited liability entity other than a corporation, an executed copy of the operating agreement along with accompanying Form U-4 for all such members who are natural persons; or (3) if a corporation, the corporate articles of incorporation, corporate by-laws, a listing of all officers, directors and shareholders along with accompanying Form U-4s. Third, under new Phlx Rule 931(e) each lessor who is not a natural person is required to submit certain information to the Exchange, including: (1) as of the last business day of each calendar quarter, a list of all limited partners if the lessor is a limited partnership; a membership list if the lessor is a limited liability entity other than a corporation along with any new subscription agreement; and a shareholder list if the lessor is a corporation, and (2) any material change in the corporate or organization's structure within ten days of the change in the structure.

According to the Phlx, the amended rule codifies existing practices of the Exchange's Office of the Secretary and Examinations Department respecting processing of applications for approval as an approved lessor of the Phlx.<sup>5</sup> The proposal will allow the Exchange to monitor any changes in ownership interest respecting the membership or memberships held by approved lessors.<sup>6</sup> The proposal will also allow the Exchange to monitor for any potential statutory disqualifications respecting shareholders, partners and members of limited liability entities by requiring the filing of Form U-4 and amendments to Form U-4 for natural persons as well as various corporate, organizational agreements or partnership interest disclosures for other entities.

<sup>5</sup> Upon approval, an approved lessor of the Phlx must sign a pledge to abide by the constitution, bylaws and rules of the Exchange. Telephone conversation between Murray L. Ross, Esq., Vice President and Secretary, Phlx, and Marc McKayle, Attorney, Division, Commission (August 19, 1998).

<sup>6</sup> Pursuant to Phlx Rule 17, a lessor leases legal title of his membership to a lessee while retaining the equitable title.

#### III. Discussion

After careful consideration the Commission has determined to approve the proposed rule change. For the reasons discussed below, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of Sections 6(b)(5) and 6(c)(3)(B) of the Act.<sup>7</sup> In particular, the Commission believes the proposal is consistent with the Section 6(b)(5)<sup>8</sup> requirements that the rules of an exchange be 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, to prevent fraudulent and manipulative acts, and, in general, to protect investors and the public. Section 6(c)(3)(B)<sup>9</sup> provides that a national securities exchange may examine and verify the qualifications of an applicant to become a person associated with a member in accordance with procedures established by the rules of the exchange, and require any person associated with a member, or any class of such persons, to be registered with the exchange in accordance with procedures so established.

The Commission believes that the amendments to Phlx Rule 931 will clarify, as well as codify, existing Exchange policy requiring the maintenance of current information for persons associated with member organizations. The proposed rule change should facilitate compliance with the Phlx's registration requirements and help ensure that all persons who are or will be affiliated with a member's securities business are registered with the Phlx. The Commission believes that the amendments to Phlx Rule 931, which should enable the Exchange to (1) monitor changes in ownership interest respecting the membership or memberships held by approved lessors, (2) monitor for any potential statutory disqualifications respecting shareholders, partners and members of limited liability entities, and (3) monitor the source of funds utilized to purchase ownership interests affiliated with the membership or memberships held by approved lessors, are appropriate means for the Exchange to ensure the high standard of competence and integrity required of a person affiliated with a national securities exchange. The

<sup>7</sup> 15 U.S.C. 78f(b)(5) and (c)(3)(B).

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

<sup>9</sup> 15 U.S.C. 78f(c)(3)(B).

<sup>15</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 Murray L. Ross, Esq., Vice President and Secretary, Phlx, to Michael Walinskas, Esq., Deputy Associate Director, Division of Market Regulation ("Division"), Commission, dated June 6, 1998 ("Amendment No. 1"). In Amendment No. 1, the Phlx consent to have the proposed rule change published for notice and comment and treated pursuant to Section 19(b)(2) of the Act. In addition, in Amendment No. 1 the Phlx proposes to adopt Commentary .01 to Phlx Rule 931 which will require approved lessors to update any Form U-4 (Uniform application for Securities Industry Registration or Transfer), submitted pursuant to Phlx Rule 931(d), within thirty days of learning that the information contained in Form U-4 has become incomplete or inaccurate. Where an amendment to Form U-4 involves a statutory disqualification as defined in Sections 3(a)(39) and 15(b)(4) of the Act, Commentary .01 will require that the amended Form U-4 be submitted not later than ten days after the statutory disqualification occurs.

<sup>4</sup> Securities Exchange Act Release No. 40180 (July 8, 1998), 63 FR 38223.