

requirement of the definition of bona fide independent market that the security be listed on The Nasdaq Stock Market. Market makers for securities listed on The Nasdaq Stock Market are required to meet certain net capital standards, publish bona fide bid and ask quotations in Nasdaq, which is a recognized interdealer quotation system, furnish quotes to other brokers and dealers on request, and stand ready, willing and able to effect transactions at quoted prices with other brokers and dealers. Therefore, the NASD is incorporating the current requirements into a single standard requiring that the market maker be registered as a Nasdaq market maker.

The NASD believes that the definition of bona fide independent market maker should also provide investors with greater assurance that the market maker's activities are independent of any influences that may arise when the issuer's ownership of securities or interest in the offering become material. Therefore, the NASD is proposing to adopt as part of the revised definition that a bona fide independent market maker (i) must not be a recipient of any of the net proceeds of the offering, (ii) must not be an affiliate of the entity issuing the securities, and (iii) does not in the aggregate itself beneficially own, nor together with its associated persons, at the time of the filing of the registration statement or offering circular, five percent or more of the outstanding voting securities of the entity issuing the securities, if a corporation, or five percent or more of a partnership interest in the distributable profits or losses of the entity, if a partnership.

III. Discussion

The Commission believes that the proposed rule change is consistent with the Act and the rules and regulations promulgated thereunder. Specifically, the Commission believes that approval of the proposed rule change is consistent with Sections 15A(b)(6)⁷ and 15A(b)(9)⁸ of the Act. Pursuant to Section 15A(b)(6), the proposed rule change clarifies and strengthens the criteria for determining a bona fide

⁷ Section 15A(b)(6) requires the Commission to determine that a registered national securities association's rules are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and national market system; and are not designed to permit unfair discrimination among customers, issuers, brokers, or dealers.

⁸ Section 15A(b)(9) requires the Commission to determine that a registered national securities association's rules not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

independent market and the related concept of a bona fide independent market maker. In so doing, the NASD has removed an impediment to the functioning of a free and open market by improving the criteria used for determining that a market of sufficient depth and liquidity exists to constitute an efficient pricing mechanism for the securities to be distributed. The new definitions also promote economic efficiency because in applicable situations, members will now be able to conduct secondary offerings without incurring the time and expense of engaging a qualified independent underwriter.

The Commission requested clarification from the NASD regarding the term "traded" in proposed paragraph (b)(3)(B) of Rule 2720.⁹ NASDR has confirmed that "traded" encompasses any completed transaction of the day for the security during normal trading hours, up to and including the last reported trade for the day.¹⁰

Pursuant to Section 15A(b)(9), the proposed rule change does not impose any unnecessary or inappropriate burden on competition, but reflects an attempt to update definitions that contain provisions that no longer adequately represent current market practices or pricing. The revised definitions are stringent enough to properly regulate public distributions where a member issues its own securities or where a conflict or control relationship with a parent or affiliate exists, while still providing protection for investors in this type of offering.

IV. Conclusion

For the above reasons, the Commission believes that the proposed rule change is consistent with the provisions of the Act, and in particular with Sections 15A(b)(6) and 15A(b)(9).

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹¹ that the proposed rule change (SR-NASD-96-17) be, and hereby is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

⁹ The relevant language of paragraph (b)(3)(B) to Rule 2720 is as follows: ". . . and which has traded at a price of five dollars or more per share in at least 20 of the 30 trading days. . . ."

¹⁰ Letter to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, from Alden S. Adkins, General Counsel, NASD Regulation, Inc., dated July 3, 1996. See also letter to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, from John Ramsay, Deputy General Counsel, NASD Regulation, Inc., dated July 15, 1996, confirming that the definition applies to trades completed during normal trading hours.

¹¹ 15 U.S.C. 78s(b)(2) (1988).

¹² 17 CFR 200.30-3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

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[Release No. 34-37476; File No. SR-NYSE-95-43]

Self-Regulatory Organizations; the New York Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change Relating to Amendments to Exchange Rules 27, 476(a)(11), and 477

July 24, 1996.

On January 5, 1996, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Exchange Rules 27, 476(a)(11), and 477 to require persons under Exchange jurisdiction to comply with information requests from commodities markets and associations and foreign self-regulatory organizations and associations.

The proposed rule change was published for comment in the Federal Register on February 16, 1996.³ No comments were received on the proposal.

Currently, Rule 27 authorizes the Exchange to enter into information sharing agreements with domestic and foreign self-regulatory organizations or associations,⁴ but does not provide for such agreements with commodities regulatory organizations such as contract markets and registered futures associations.

Rule 476(a)(11) permits the Exchange to initiate a disciplinary proceeding against a member, member organization, allied member, approved person, registered or non-registered employee of a member organization or a person otherwise subject to the jurisdiction of the Exchange, for failure to furnish information to, or appear or testify before the Exchange or another domestic self-regulatory organization. The rule

¹ 15 U.S.C. § 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 36831 (Feb. 12, 1996), 61 FR 6279 (Feb. 16, 1996) (notice of File No. SR-NYSE-95-43).

⁴ The Act defines the term "self regulatory organization" as any national securities exchange, registered securities association, or registered clearing agency, or (solely for purposes of sections 19(b), 19(c), and 23(b) of the Act) the Municipal Securities Rulemaking Board established by section 15B of the Act. 15 U.S.C. § 78c(a)(26). Although the Act does not define the term "foreign self-regulatory organization," the NYSE interprets it to include non-U.S. commodities markets. Letter, *infra* note 5.

does not authorize the Exchange to initiate such a proceeding when someone under Exchange jurisdiction fails to cooperate with a commodities market or association or a foreign self-regulatory organization or association.

Rule 477 permits the Exchange to require a member, member organization, allied member, approved person or registered or non-registered employee of a member organization that is terminating his or her status as such to comply with a request to appear, testify, submit books, records, papers, or objects and to respond to written requests and attend hearings in the same manner and to the same extent as if such person had maintained his or her status, if, prior to such termination, or during the period of one year immediately following the receipt by the Exchange of written notice of the termination, the Exchange makes such a request in writing. The rule does not require the above parties to comply with such requests from commodities markets or associations or from foreign self-regulatory organizations or associations.

The Exchange is proposing to amend Rule 27 to add contract markets and registered futures associations, as referenced in Rule 476(a)(11), to the list of entities with which the Exchange is authorized to enter into information sharing agreements.⁵ The extent to which those under the Exchange's jurisdiction would be required to cooperate would be predicated on the subject matter or scope of the relevant information sharing agreement. Rule 476(a)(11) would be amended to require that those under its jurisdiction cooperate with information requests from domestic commodities markets and associations and foreign self-regulatory organizations and associations as well as from domestic securities markets.⁶ Rule 477 would be

⁵ NYSE Rule 476(a)(11) defines the terms "contract market" and "registered futures association" by reference to Sections 6(a) and 17 of the Commodity Exchange Act, respectively. See 7 U.S.C. §§ 7-8. Under Section 6(a), the term contract market refers to a board of trade that the Commodity Futures Trading Commission ("CFTC") has designated as such. *Id.* Under Section 17, the term registered futures association refers to an association of persons registered as such with the CFTC. *Id.*

The Exchange has interpreted the term "foreign self-regulatory organization or association" to include entities which are non-U.S. commodities markets and has relied on this interpretation to enter into agreements with foreign self-regulators that are organized as commodities markets such as the London International Financial Futures and Options Exchange. See Letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Ivette López, Assistant Director, Division of Market Regulation, SEC dated July 19, 1996.

⁶ In lieu of commencing disciplinary proceedings pursuant to NYSE Rule 476(a)(11), the Exchange

amended to require compliance with information requests submitted by the organizations specified in Rule 476(a)(11).⁷

The Exchange believes that it is appropriate to expand the scope of its disciplinary proceedings to include a failure to cooperate with contract markets and registered futures associations and foreign self-regulatory organizations and associations because of its continued commitment to the enhancement of its regulatory efforts and the regulatory efforts of other market centers with which the Exchange has agreed to share information.

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 Section 6(b).⁸ In particular, the Commission believes the proposal is consistent with the Section 6(b)(5) requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, and, in general, to protect investors and the public interest.⁹

The Commission believes that the amendment to Rule 27, adding contract markets and registered futures associations as referenced in Rule 476(a)(11) to the list of entities with which the NYSE may enter into information sharing agreements, is appropriate.¹⁰ As previously in effect,

could impose a fine not to exceed \$5,000 pursuant to the terms of its minor rule violation plan as set forth in NYSE Rule 476A. See Securities Exchange Act Release No. 25862 (Jun. 28, 1988), 53 FR 25400 (Jul. 6, 1988) (order approving File No. SR-4-284).

⁷ The NYSE has stated that, in connection with Rules 27, 476(a)(11), and 477, it is its policy to afford NYSE members the same rights and procedural protections that such person or entities would have if the Exchange had initiated the request for information or testimony. Telephone conversation on February 2, 1996 between Donald Siemer, Director, Market Surveillance, NYSE and George A. Villasana, Attorney, Division of Market Regulation, SEC. In furtherance of this policy, the Exchange will always act as an intermediary between another SRO, a contract market or a registered futures association and the exchange member, member organization, or other designated person under Rule 476(a)(11) from whom information or testimony is being sought for any inquiry made pursuant to an agreement under Rule 27. *Id.*

⁸ 15 U.S.C. § 78f(b).

⁹ 15 U.S.C. § 78f(b)(5).

¹⁰ The Commission understands NYSE Rule 476(a)(11), as amended, to encompass contract markets only to the extent that they have been designated as such by the CFTC and futures associations only to the extent that they have been registered with the CFTC. See Release No. 34-36831, *supra* note 3 (stating that NYSE Rule 27, as in effect prior to this amendment, does not authorize the Exchange to enter into information sharing agreements with commodities regulatory

Rule 27 limited the NYSE by not providing for such agreements with contract markets and registered futures associations. By adding these entities as referenced in Rule 476(a)(11), the amendment furthers the interest of the public and provides for the protection of investors by allowing the Exchange to assist other domestic markets to conduct prompt inquiries into possible trading violations and other possible misconduct. The Commission believes that the exercise of this authority will enhance the NYSE's surveillance program and provide the Exchange with sufficient information necessary for it to carry out its oversight responsibilities with respect to enforcement-related matters in an efficient and expeditious manner.

The Commission also believes that the amendment to Rule 476(a)(11), authorizing the Exchange to initiate a disciplinary proceeding when those under its jurisdiction fail to cooperate with information requests from contract markets as referenced in Section 6(a) of the Commodity Exchange Act,¹¹ any registered futures association as referenced in Section 17 of the Commodity Exchange Act,¹² or any foreign self-regulatory organization or association with which the Exchange has entered into an agreement, furthers the interest of the public and provides for the protection of investors by allowing the Exchange to appropriately discipline those members that are guilty of misconduct.

Finally, the Commission believes that the amendment to Rule 477, expanding the Exchange's authority to require a member, member organization, allied member, approved person, or registered or non-registered employee of a member or member organization to comply with any requests of an organization or association included in Rule 476(a)(11) to appear, testify, submit books, records, papers, or tangible objects, respond to written requests, and attend hearings subject to certain conditions, will further the interest of the public and provides for the protection of investors by allowing certain organizations and associations to acquire information necessary to ensure that Exchange members are conducting business in conformance with the Constitution and Rules of the Exchange.

The Commission believes that the proposed rule change achieves a reasonable balance between the need for regulatory cooperation and protection of

organizations such as contract markets and registered futures associations).

¹¹ 7 U.S.C. § 8.

¹² 7 U.S.C. § 21.

the procedural rights of Exchange members and others from whom information or testimony is requested. The rule would provide the Exchange with the authority to seek cooperation by certain persons with respect to inquiries and investigations resulting from regulatory agreements between the Exchange and other self-regulatory organizations and associations while explicitly providing any person or entity required to furnish information or testimony pursuant to the rule with the same procedural rights that they would have if the request was pursuant to an Exchange initiated inquiry or investigation.¹³

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁴ that the proposed rule change (SR-NYSE-95-43) is approved.

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

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[Release No. 34-37472; File No. SR-Phlx-96-28]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc., Relating to the Listing of Hybrid Securities

July 23, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on July 19, 1996, 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 and II below, which Items have been prepared by the self-regulatory organization. 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 is proposing to amend Phlx Rule 803(f) in order to conform the Exchange's listing criteria for hybrid securities to those of the New York Stock Exchange ("NYSE") and the American Stock Exchange ("Amex").

The text of the proposed rule change is available at the Exchange and 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 self-regulatory organization 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 self-regulatory organization 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

In March 1992, the Commission approved the adoption of subsection (f) under Phlx Rule 803 containing guidelines for listing securities that have features common to both equity and debt securities, yet do not fit within the traditional definitions of such securities.² Sometimes referred to as "hybrids," these securities can take a variety of forms. Although the Exchange has not listed any hybrid securities to date, it does trade certain ones pursuant to unlisted trading privileges ("UTP");³ for example, PERCS and trust convertible preferred securities.

In reviewing its hybrid security listing rules, the Exchange noticed that certain provisions which initially were also included in the NYSE and Amex rules have since been removed. Because the Exchange may in the future trade other hybrid securities listed on either the NYSE or the Amex pursuant to UTP, the Exchange believes it is unnecessary for its rules to be more onerous than those of the NYSE or the Amex. Accordingly, the Phlx seeks to conform its rules therewith.

Phlx Rule 803(f) currently specifies the minimum issuer qualifications, the minimum public distribution and

² See Securities Exchange Act Release No. 30466 (March 11, 1992), 57 FR 9301 (March 17, 1992). At the time the rule was approved, it was denoted as Supplementary Material .02 to Rule 803 and was subsequently reapproved in the same form as renumbered subsection (f) when the Exchange's two tiered listing standards were approved. See Securities Exchange Act Release No. 34235 (June 17, 1994), 59 FR 32736 (June 24, 1994).

³ Rule 12f-5 under the Act provides that an exchange must have in effect rules providing for transactions in the class of type of security to which it extends unlisted trading privileges.

aggregate market value of the security and other criteria to assist the Exchange in its case by case review and determination of the suitability of each security prior to its approval for listing. The Exchange now proposes to remove current provisions that prohibit the listing of (1) any cash settled product that is settled in any currency other than U.S. dollars, or (2) any product that has a mandatory redemption price of less than three dollars.⁴ Additionally, the Exchange proposes to delete the provision requiring only 100 public holders if the security is traded in thousand dollar denominations, thereby requiring 400 holders regardless of the denomination.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act in general and furthers the objectives of Section 6(b) in particular in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest in that it conforms the Exchange's listing standards for hybrid securities to those of the NYSE and the Amex.

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

The proposed rule change does not impose any burden on competition that is 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 Exchange has neither solicited nor received written comments on the proposed rule change.

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

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; (3) does not become operative for 30 days from July 19, 1996, the date on which it was filed, and (4) the Exchange 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, it has become effective pursuant to Section 19(b)(3)(A)

⁴ The Commission recently approved similar amendments to Amex's rules. See Securities Exchange Act Release No. 37165 (May 3, 1996), 61 FR 21215 (May 9, 1996).

¹³ Telephone conversation, *supra* note 7.

¹⁴ 15 U.S.C. § 78s(b)(2).

¹⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).