

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97-14123 Filed 5-29-97; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold the following meeting during the week of June 2, 1997.

A closed meeting will be held on Tuesday, June 3, 1997, at 11:00 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c) (4), (8), (9)(A) and (10) and 17 CFR 200.402(a) (4), (8), (9)(i) and (10), permit consideration of the scheduled matters at the closed meeting.

Commissioner Johnson, as duty officer, voted to consider the items listed for the closed meeting in a closed session.

The subject matter of the closed meeting scheduled for Tuesday, June 3, 1997, at 11:00 a.m., will be:

Institution and settlement of injunctive actions.

Institution and settlement of administrative proceedings of an enforcement nature.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942-7070.

Dated: May 28, 1997.

Jonathan G. Katz,

Secretary.

[FR Doc. 97-14282 Filed 5-28-97; 11:38 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-38670 File No. SR-NASD-97-29]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendments No. 1 and No. 2 Thereto by the National Association of Securities Dealers, Inc. Relating to Prohibition on Members Receiving any Payment to Publish a Quotation, Make a Market in an Issuer's Securities or Submit an Application to Make a Market in an Issuer's Securities

May 22, 1997.

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 April 18, 1997, the National Association of Securities Dealers, Inc. ("NASD" or "Association") 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 self-regulatory organization. On May 19, 1997 and May 21, 1997, NASD submitted two amendments ("Amendment No. 1") and "Amendment No. 2"), respectively, to the proposed rule change.³ 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 NASD is proposing Rule 2460 to prohibit members from receiving any payment to publish a quotation, make a market in an issuer's securities, or submit an application to make a market.⁴ Below is the text of the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Letter from Alden Adkins, Vice President and General Counsel, NASD Regulation, to Elaine Darroch, Attorney, Division of Market Regulation, SEC (May 16, 1997) ("Amendment No. 1"). In Amendment No. 1, NASD Regulation made technical corrections to the text of the rule, provided an explanation for not expressly prohibiting member-to-member payments of making a market, and added an explanatory footnote concerning the rule's coverage. Letter from Alden Adkins, Vice President and General Counsel, NASD Regulation, to Elaine Darroch, Division of Market Regulation, SEC (May 21, 1997) ("Amendment No. 2"). Amendment No. 2 corrected a minor omission in Amendment No. 1.

⁴ The proposed rule change was approved by the Board of Directors of the NASD Regulation at its meeting on March 12, 1997, which authorized the filing of the rule change with the SEC. The NASD, Inc., Board of Governors declined to review the proposed rule change at its meeting on April 10, 1997. No other action is necessary to approve the proposed rule change. See Amendment No. 1, *supra* note 3.

proposed rule change. Proposed new language is in italics.

2460. Payments for Market Making

(a) *No member or person associated with a member shall accept any payment or other consideration, directly or indirectly, from an issuer of a security, or any affiliate or promoter thereof, for publishing a quotation, acting as market maker in a security, or submitting an application in connection therewith.*

(b) *The provisions of paragraph (a) shall not preclude a member from accepting:*

(1) *payment for bona fide services, including, but not limited to, investment banking services (including underwriting compensation and fees); and*

(2) *reimbursement of any payment for registration imposed by the Securities and Exchange Commission or state regulatory authorities and for listing of an issue of securities imposed by a self-regulatory organization.*

(c) *For Purposes of this rule, the following terms shall have the stated meanings:*

(1) *"affiliate" shall have the same definition as used in Rule 2720 of the business Conduct Rules of the Association;*

(2) *"promoter" means any person who founded or organized the business of enterprise of an issuer, is a director or employee of an issuer, acts or has acted as a consultant, advisor, accountant, or attorney to an issuer, is the beneficial owner of any of an issuer's securities that are considered "restricted securities" under Rule 144, or is the beneficial owner of five percent (5%) or more of the public float of any class of an issuer's securities, and any other person with a similar interest in promoting the entry of quotations or market marking in an issuer's securities; and*

(3) *"quotation" shall mean any bid or offer at a specified price with respect to a security, or any indication of interest by a member in receiving bids or offers from others for a security, or an indication by a member that he wishes to advertise his general interest in buying or selling a particular security.*

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 NASD 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 NASD has prepared summaries, set forth in Section 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

It has been a longstanding policy and position of the NASD that a broker-dealer is prohibited from receiving compensation or other payments from an issuer for quoting, making a market in an issuer's securities, or for covering the member's out-of-pocket expenses for making a market, or for submitting an application to make a market in an issuer's securities.⁵ As stated in Notice to Members 75-16 (February 20, 1975), such payments may be viewed as a conflict of interest since they may influence the member's decision as to whether to quote or make a market in a security and, thereafter, the prices that the member would quote.

In the past, certain broker-dealers have entered into arrangements with issuers to accept payments from an issuer, affiliate, or promoter of the issuer to make a market in the issuer's securities, or for covering out-of-pocket expenses of the member incurred in the course of market making, or for submitting an application to act as a market maker. As stated above, the NASD believes that such conduct may be viewed as a conflict of interest. The NASD believes that a market maker should have considerable latitude and freedom to make or terminate market making activities in an issuer's securities. The decision by a firm to make a market in a given security and the question of price generally are dependent on a number of factors, including, among others, supply and demand, the firm's expectations toward the market, its current inventory position, and exposure to risk and competition. This decision should not be influenced by payments to the member from issuers or promoters.

On October 27, 1994, the United States Court of Appeals, Tenth Circuit, reversed, in part, an SEC decision in the matter of *General Bond & Share Co.* ("General Bond").⁶ The NASD had held that General Bond had, among other things, violated Article III, Section 1 of the Association's Rules of Fair Practice (currently NASD Rule 2110) by accepting payments from issuer's in

return for listing itself as a market maker for the securities in the National Quotation Bureau, Inc. ("NQB") Pink Sheets ("Pink Sheets"). The NASD position was based on NASD policy as articulated to the members in Notice to Members 75-16 (February 20, 1975). The SEC, in affirming the NASD decision, agreed with the NASD that this conduct was inappropriate and in violation of NASD rules.⁷

The Tenth Circuit decision held that the NASD rules at the time did not prohibit a member firm from accepting issuer-paid compensation for making a market in a security.⁸ Although the NASD had previously stated that such specific conduct was prohibited, the Court held that the NASD was required by statute to submit a filing with the SEC amending NASD rules in this respect. The NASD is proposing this rule to clarify the application of NASD rules to situations involving the acceptance of compensation for market making activities.

The proposed rule is intended to apply a fair practice standard to a particular course of conduct of a member as described below. In addition, however, the action of a member in charging an issuer a fee for making a market, or accepting an unsolicited payment from an issuer where the member makes a market in the issuer's securities, could also subject the member to violations of the antifraud provisions of federal securities laws and NASD Rule 2120. Further, the payment by an issuer to a market maker to facilitate market making activities also may cause the member to contribute to violations of Section 5 of the Securities Act of 1933.⁹

Description of Proposed Rule

The proposed rule would prohibit receipt by a broker-dealer of "any payment or other consideration" from a prohibited party and is intended to cover any form of payment in cash, non-cash items, or securities. The term

"consideration" would include, for example, granting or offering of securities products on terms more favorable than those granted or offered to the public. This term would include the granting of options in any security, where the options are exercisable at a price that is discounted from the prevailing market price. The rule also would cover the purchase of securities by a member from a prohibited party at a discount from the prevailing market. Such payments are intended to be prohibited because they may, as discussed in Notice to Members 75-16, create a conflict of interest that would influence the member to enter a quotation or make a market in a security.

The proposed rule prohibits payments that are made "for publishing a quotation, acting as a market maker in a security, or submitting an application in connection therewith." This language would apply the prohibitions of the rule to the entry of a quotation in a security, making a market in a security, and the entry of a quotation or the quotation of a security at a particular price.¹⁰ The definition of "quotation" is drawn from Rule 15c2-11 of the Act¹¹ and includes indications of interest.¹² The proposed rule also specifies that a member may not impose a fee or accept a payment for submitting an application to enter quotations or make a market in an issuer's securities, e.g., a NASD Form 211 application to enter a quotation in the OTC Bulletin Board or NQB Pink Sheets.

The proposed rule would apply to payments by an issuer, an affiliate of the issuer, or a promoter, whether received directly or indirectly through another party. Whether a person is considered an affiliate would be determined under the provisions of NASD Rule 2720 that relate to the existence of a control relationship between an issuer and a member. For purposes of NASD Rule 2720, the term "affiliate" shall mean "a company which controls, is controlled by or is under common control with a member." In addition, the term

⁷ *In the Matter of General Bond & Share Co.*, Securities Exchange Act Release No. 32291 (May 11, 1993), 54 SEC Docket 129.

⁸ The Court reversed the SEC's finding of violation that related to the firm's acceptance of issuer-paid compensation, but sustained all of the SEC's other findings of violation by General Bond. *General Bond*, 39 F.3d 1458, 1461.

⁹ The insertion of quotations for a security in an interdealer quotation system in exchange for a payment by an issuer may result in a violation of Section 5 of the Securities Act of 1933 based on the issuer's interest in facilitating the subsequent sale. This "second sale" theory was articulated by the SEC and upheld by the court in *SEC v. Harwyn Industries, Inc.*, 326 F. Supp. 943 (S.D.N.Y. 1971) See, Letter from Kenneth S. Spier, Attorney, Division of Market Regulation, SEC, to Jack Rubens, Monroe Securities, Inc. (May 4, 1973).

¹⁰ NASD Notice to Members 75-16 states that questionable payments to market maker have the potential to influence the member's " * * * decision to make a market and thereafter, perhaps, the prices it would quote." NASD Notice to Members, *supra* note 5.

¹¹ 17 CFR 240.15c2-11(e)(3).

¹² The proposed rule would apply to any situation in which member broker-dealer quotations are published in any interdealer quotation system, or any publication or electronic communication network or device which is used by brokers or dealers to make known to others their interest in transactions in any security, including offers to buy and sell at a stated price or otherwise, or invitations of offers to buy or sell. See Amendments No. 1 and No. 2, *supra* note 3.

⁵ See NASD Notice to Members 75-16 (February 20, 1975) and 92-50 (October 1992).

⁶ *General Bond & Share Co. v. Securities and Exchange Commission*, 39 F.3d 1451 (10th Cir. 1994).

"affiliate" is also presumed under certain circumstances in which a member or company is presumed to control, or presumed to be under common control, when the respective entities beneficially own ten percent or more of the outstanding voting securities of the other entity.¹³

The concept of "promoter" is broadly defined to encompass all persons other than the issuer and its affiliates who would have an interest in influencing a member to make a market in a security. Thus, the definition includes not only the organizer of the issuer's business, but also any director, employee, consultant, accountant, or attorney of the issuer. In addition, certain categories of securityholders are also within the definition, since these persons are considered to have an interest greater than that of the average securityholder in ensuring the existence of an active market. The categories in the definition, however, are intended to be illustrative only, and the proposed rule would prohibit payments by any similar person with an interest in promoting the entry of quotations or market making in the issuer's securities.

The proposed rule change does not specifically cover member-to-member payments in the express language of the proposed rule.¹⁴ The reasons for the exclusion of member-to-member conduct in the express language of the rule are as follows. This member-to-member conduct arguably is already covered by other provisions of the proposed rule, provisions of another proposed Conduct Rule, and an existing Conduct Rule.¹⁵ First, the definition of a promoter could apply to payments by one member to another member to publish a quote, make a market, or file an application therewith for a particular security for the purpose of promoting interest in a particular security.¹⁶ In addition, such payments may also fall within the scope of proposed conduct rule interpretation IM-2110-5 (SR-NASD-97-37),¹⁷ which would prohibit certain anticompetitive conduct of member broker-dealers. In particular, the proposed rule interpretation would prohibit certain "coordinated" activity among member broker-dealers regarding prices (including quotations), trades, or trade reports. Thus, certain coordinated efforts in publishing quotations or setting prices may be subject to the

provisions of the proposed rule.¹⁸ Furthermore, member-to-member payments in some cases may also be covered by NASD Conduct Rule 2110 as conduct that is inconsistent with high standards of commercial honor and just and equitable principles of trade.¹⁹ In addition, member-to-member payments not specifically prohibited under the provisions above may involve legitimate broker-dealer activity for which exemptions from the proposed rule would have to be crafted. Crafting appropriate exemptions would complicate the proposed rule unnecessarily in light of the absence of a history of abusive conduct in member-to-member payments that would not otherwise be prohibited under the provisions above.²⁰

The proposed rule also is intended to prohibit indirect payments by the issuers, affiliates, or promoters through other members. Thus, members may not accept payments from other members that originate from an issuer, affiliate, or promoter of the issuer.

In addition, the proposed rule contains a general exception that permits payments to a member by prohibited persons for "bona fide services". Such *bona fide* services are intended to include, but not be limited to, investment banking services, including traditional underwriting compensation and fees. The proposed rule contains a further exemption for reimbursement of fees imposed by the SEC and states and listing fees imposed by self-regulatory organizations. Such fees have been generally considered costs of the issuer, even when paid by a broker-dealer.

The proposed rule as originally proposed for public comment²¹ included a third exception,²² which was intended to encourage members to conduct an initial Rule 15c2-11 review²³ of the issuer and the security by permitting reimbursement of the

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ NASD Notice to Members 96-83 (December 1996).

²² The third exception to the original proposed rule stated: (b) The provisions of paragraph (a) shall not preclude a member from accepting: . . . (3) reimbursement of reasonable out-of-pocket expenses on an accountable basis, not including the member's overhead, in connection with the member's initial review process in determining whether to agree to publish a quotation or to act as a market maker in a particular security.

²³ Rule 15c2-11 imposes an "affirmative review" obligation on a broker-dealer to form a reasonable belief that the information submitted in connection with an application to enter a quotation is accurate in all material respects and that the sources of the information are reliable. See Securities Exchange Act Release No. 29094 (April 17, 1991), 56 FR 19148 (April 25, 1991).

member's reasonable out-of-pocket expenses related to this review. The third exception was eliminated from the proposed rule due to concerns that such payments could violate Section 17(b) of the Securities Act of 1933²⁴ and could be used inappropriately to avoid the limitations of the proposed rule.

The NASD will announce the effective date of the proposed rule change in a Notice to Members to be published no later than 45 days following Commission approval. The effective date will be no more than 30 days following the publication of the Notice to Members announcing Commission approval.

(b) The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act²⁵ in that regulating the conduct of member broker-dealers by prohibiting the receipt of compensation or other payments from an issuer or others for quoting, or make a market in an issuer's securities is in furtherance of the requirements that the Association's rules promotes just and equitable principles of trade, prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest.

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

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

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

The proposed rule change was published for comment in Notice to Members 96-83 dated December, 1996. In addition, the proposed rule was posted on the NASD website (www.nasdr.com), which also solicited comments via E-mail. In total, four (4) comments were received in response thereto. A copy of the Notice to Members is attached as Exhibit 2 to the rule filing. A copy of the comment letters received in response thereto are attached as Exhibit 3 to the rule filing. Of the four (4) comment letters received, two (2) were in favor of the proposed

²⁴ Section 17(b) of the Securities Act of 1933 explicitly makes it unlawful for any person receiving consideration, directly or indirectly from an issuer, to publish or circulate any material which describes such issuer's securities without fully disclosing the receipt of such consideration, whether past or prospective, and the amount thereof.

²⁵ 15 U.S.C. § 78o-3.

¹³ See NASD Rule 2720(b)(1)(B) (i), (ii), and (iii).

¹⁴ See Amendment No. 1, *supra* note 3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The NASD filed this proposed rule change with the Commission on May 7, 1997. The notice of the proposed rule change will be published in the near future.

rule change, one (1) was opposed, and one (1) was neither in favor nor opposed.

Of the two commentators that were in favor of the proposal, one was in favor on the assumption that the proposed rule would continue not to cover member reimbursements for payment for order flow and directed orders.²⁶ The other commentator was in favor of the proposed rule, and further suggested that we eliminate the third exception (*i.e.*, permitting reimbursement for certain accountable costs) to the proposed rule on the ground that it represents an invitation for abuse by certain market makers.²⁷ One commentator opposed the proposed rule on the grounds that the proposed rule was complex and suggested that the proposed rule should require disclosure of all such payments and relationships similar to the requirements on market makers to disclose payment for order flow arrangements.²⁸ One commentator neither favored nor opposed the proposed rule and offered a suggestion that small issuers provide the required documentation to the NASD after issuer's counsel review. Apparently, the issuer's counsel review would substitute for the member broker-dealer's review.²⁹

Based on the above responses, the NASD does not believe that any modification to the proposed rule is warranted. The only negative response supports requiring disclosure of payments and relationships, rather than prohibiting the conduct with exceptions. The NASD continues to believe that the inherent conflicts addressed by the proposal continue to require direct regulatory action, and that disclosure of such conflicts would not be an adequate substitute. Further, the text of the proposed rule is consistent with the NASD's longstanding policy.

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

Within 35 days of the 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 self-regulatory organization consents, the Commission will:

(A) By order approve the 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. The Commission requests particular comments addressing whether payments by other members to publish a quotation, act as a market maker, or submitting an application therewith should be specifically prohibited and what impact such a prohibition would have on existing payment arrangements between broker-dealers. 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. 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 at the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-97-29 and should be submitted by June 20, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.³⁰

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-38667; International Series Release No. 1084; File No. SR-Phlx-97-22]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change Relating to the Trading of Customized Foreign Currency Options on the Mexican Peso

May 22, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

("Act"),¹ notice is hereby given that on May 2, 1997, 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 Phlx. On May 21, 1997, Phlx amended the filing.² 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

Pursuant to Rule 19b-4 of the Act,³ Phlx proposes to amend its rules to accommodate the trading of customized foreign currency options on the Mexican peso.⁴

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

In its filing with the Commission, Phlx included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. 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

The Exchange presently offers listed foreign currency option contracts on the British pound, French franc, Swiss franc, Japanese yen, Canadian dollar, Australian dollar, German mark and the European Currency Unit. Since November 1994, the Exchange has offered the ability to trade customized contracts on all currencies in relation to the U.S. dollar or in relation to each other.⁵ In 1995, the Exchange listed for trading customized options on the Italian lira and the Spanish peseta.⁶ The Exchange now proposes to list and trade

¹ 15 U.S.C. 78s(b)(1).

² Letter from Nandita Yagnick, CBOE, to Margaret Blake, Division of Market Regulation, Commission (May 21, 1997).

³ 17 CFR 240.19b-4.

⁴ The text of the proposed changes to Exchange Rules 722, 1000(b) (13) and (15), 1009, 1014, 1033, 1034 and 1069 is attached as Exhibit B to File No. SR-Phlx-97-22, and is available for review in the principal office of Phlx and in the Public Reference Room of the Commission.

⁵ See Securities Exchange Act Release No. 34925 (November 1, 1994), 59 FR 55720 (November 8, 1994).

⁶ See Securities Exchange Act Release No. 36255 (September 20, 1995), 60 FR 50229 (September 28, 1995).

²⁶ See, comment letter 2.

²⁷ See, comment letter 3.

²⁸ See, comment letter 4.

²⁹ See, comment letter 1.

³⁰ 17 CFR 200.30-3(a)(12).