

thereunder,<sup>2</sup> a proposed rule change relating to its "Clearly Erroneous Policy." Notice of the proposed rule change was published for comment in the *Federal Register* on October 22, 2002.<sup>3</sup> No comments were received on the proposed rule change.

The PCX, through its wholly owned subsidiary PCX Equities, Inc. ("PCXE"), proposes to amend PCXE Rule 7.11(d) to confer authority on a PCXE officer designated by PCXE who, in addition to the Chief Executive Officer and President, may nullify transactions or modify their terms arising out of any disruption or malfunction in the Archipelago Exchange trading system, the equities trading facility of PCXE. The rule change also adds conforming language to PCXE Rule 10.13 regarding appeals from such decisions.

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.<sup>4</sup> Specifically, the Commission believes that the proposal is consistent with section 6(b)(5) of the Act,<sup>5</sup> which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market, and to protect investors and the public interest.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,<sup>6</sup> that the proposed rule change (File No. SR-PCX-2002-63) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46912; File No. SR-Phlx-2002-72]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 by the Philadelphia Stock Exchange, Inc. To Set Time Limits Within Which Phlx Members Must Request Credits Under the Phlx Monthly Credit Program

November 26, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 31, 2002, 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 Exchange. On November 26, 2002, the Phlx amended the proposed rule change.<sup>3</sup> The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the Phlx under section 19(b)(3)(A)(ii) of the Act,<sup>4</sup> which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Phlx proposes to adopt certain provisions in connection with its Monthly Credit Program ("Program").

##### Background

In May 2000, the Exchange adopted, for an aggregate period of 36 months,<sup>5</sup>

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

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

<sup>3</sup> See November 25, 2002, letter from Cynthia K. Hoekstra, Phlx, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission ("Amendment No. 1"). In Amendment No. 1, the Phlx replaces the text in footnote 3 on page 2 (and also footnote 4 on page 9) of the original filing with new text. For purposes of calculating the 60-day abrogation period, the Commission considers the period to have commenced on November 26, 2002, the date the Phlx filed Amendment No. 1.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>5</sup> This aggregate period of 36 months includes the time period that previous pilot programs were in effect. The first monthly credit pilot program became effective upon filing on May 16, 2000, and lasted six months, expiring on November 16, 2000. See Securities Exchange Act Release No. 42791 (May 16, 2000), 65 FR 33606 (May 24, 2000)(SR-Phlx-00-44). The pilot program was then extended for six months through May 16, 2001. See Securities

the Program, which allows a monthly credit of up to \$1,000 to be applied against fees, dues, charges and other amounts as may from time to time be owed to the Exchange that month (collectively referred to as "credit-eligible fees"), except fines, late fees, out-of-pocket expenses, pass-through costs, capital funding fees, payment for order flow fees, any fees paid by equity trading permit ("ETP") holders respecting any trading permits the Exchange may issue,<sup>6</sup> the fee for electronic communications networks, and the fee for the print subscription of the Phlx Guide by members who own the membership by which they are a member and certain other categories of members. The Program is in effect until May 16, 2003.

Pursuant to the Program, the amount of credit-eligible fees owed to the Exchange is reduced on a monthly basis by an amount equal to: (1) \$1,000 per month if such fees, dues, charges and other amounts are equal to or greater than \$1,000, or (2) the amount of such fees, dues, charges and other amounts if such fees, dues, charges and other amounts are less than \$1,000. Credits may not be carried over from one month to the next and only one credit of up to \$1,000 is available per membership per month.

Credits cannot be shared among members, except qualified member(s) in the same member organization may aggregate their credit(s). The monthly credit of up to \$1,000 will be applied against the invoice of the member or member organization with which the member is associated. Currently, any request to receive the credit is application driven with each applicant submitting an Exchange form delineating the credit-eligible fees for that calendar month. A member's eligibility for the monthly credit is determined by the opening of trading on the first business day of each month.

##### Proposal

In connection with the Program, the Exchange has accrued on its books credit-eligible funds to be reimbursed to members who are eligible for the monthly credit of up to \$1,000, but who have not submitted a request to receive

Exchange Act Release No. 43567 (November 15, 2000), 65 FR 71187 (November 29, 2000)(SR-Phlx-00-100). Therefore, the Program will be in effect from May 16, 2000 until May 16, 2003. See Securities Exchange Act Release No. 44292 (May 11, 2001), 66 FR 27715 (May 18, 2001)(SR-Phlx-2001-49).

<sup>6</sup> In March 2002, this provision was amended to provide that ETP monthly fees are credit-eligible. See Securities Exchange Act Release No. 45480 (February 26, 2002), 67 FR 10029 (March 5, 2002)(SR-Phlx-2002-10).

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

<sup>3</sup> See Securities Exchange Act Release No. 46661 (October 15, 2002), 67 FR 64950.

<sup>4</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78(c)(f).

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

<sup>6</sup> 15 U.S.C. 78s(b)(2).

<sup>7</sup> 17 CFR 200.30-3(a)(12).

the credit.<sup>7</sup> Therefore, the Exchange proposes to set a time limit within which Exchange members must request the credit.

In connection with unclaimed past credits, any member eligible for the monthly credit must submit his/her credit request form within three months after the date of the release issued pursuant to the Act whereby the proposal has been filed and has become effective. For example, if the Commission issues a Notice of Filing and Immediate Effectiveness respecting this change to the Program on, hypothetically, November 15, 2002, members will have until February 15, 2003 to claim any past credits. After that time period, any request for unclaimed past credits will be denied, except as described in the following paragraph.

Going forward, members must request their monthly credit within three months from the first day of the month in which the credits were earned. For example, if a member is eligible to receive a credit of \$600 for the month of September, the member must request that credit by December 1 (three months from September 1). Any requests for credits not made within this three month time period will be denied, and credits will not be pro-rated over any month.

The Phlx proposes no other changes to the Program at this time.

## 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 Exchange 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 time limits within which Phlx Members must request credits under the Program. Due to the bookkeeping and associated costs with monitoring the Program, the Exchange proposes to set a date certain by which the members must request a claim for past-due credits. If the credit is not claimed by that date, the members will not be able to claim the credit in the future.

In addition, the time limit within which Exchange members must request the monthly credit should promote compliance with the Exchange's intent for members to timely claim the credit and to remove from the Exchange's books reserves for unclaimed credits that may never be requested.

The Phlx intends to send a memorandum to members, member organizations and clearing firms to clarify the proposed credit procedures, and will include a copy of the memorandum with the Exchange's monthly invoice.<sup>8</sup>

#### 2. Statutory Basis.

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act<sup>9</sup> in general, and furthers the objectives of section 6(b)(4)<sup>10</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Exchange members.

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

The Exchange does not believe that the proposed rule change 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 either solicited or received.

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

The proposed rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act<sup>11</sup> and subparagraph (f)(2) of rule 19b-4 thereunder,<sup>12</sup> because it involves a due, fee, or other charge. At any time within 60 days of the filing of the proposed rule change, 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 proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to file number SR-Phlx-2002-72, and should be submitted by December 26, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

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

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<sup>7</sup> In addition, there are members who originally stated they were not eligible for the credit and therefore did not submit a request to claim the credit. These members, however, subsequently discovered they were eligible for the credit and provided supporting information to the Exchange. These members will also be allowed to claim past credits, although these amounts may not have been accrued.

<sup>8</sup> The Phlx notifies members of various Exchange proposals by way of memoranda generally sent to the members, member organizations and their respective clearing firms. The Exchange intends to send the memorandum with the October invoice, which is sent in the beginning of November.

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

<sup>10</sup> 15 U.S.C. 78f(b)(4).

<sup>11</sup> 15 U.S.C. 78s(b)(3)(a)(ii).

<sup>12</sup> 17 CFR 240.19b-4(f)(2).

<sup>13</sup> 17 CFR 200.30-3(a)(12).