

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-53604; File No. SR-Phlx-2006-19)

April 5, 2006

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Orders Marked Sell Short Entered Before the Opening

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹, and Rule 19b-4² thereunder, notice is hereby given that on March 22, 2006, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") 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 Phlx. The Phlx has designated the proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule series under paragraph (f)(1) of Rule 19b-4 under the Act,³ which renders the proposal effective upon filing with the Commission. 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, pursuant to Section 19(b)(1) of the Act⁴ and Rule 19b-4 thereunder,⁵ proposes to interpret its rules to make certain market and limit orders in Short Sale

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 240.19b-4(f)(1).

⁴ 15 U.S.C. 78s(b)(1).

⁵ 17 CFR 240.19b-4.

Exempt Securities⁶ received prior the opening pursuant to Phlx Rule 229, Supplementary Material .06 and .10(a)(iv), eligible for automatic execution, even though such orders are marked sell short.

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 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

1. Purpose

The purpose of the proposed rule change is to treat orders received over PACE⁷ prior to the opening in a manner consistent with the treatment expected by the member organizations entering the orders. Pursuant to Phlx Rule 229, Supplementary Material .06 and .10(a)(iv), certain market and limit orders received prior to the opening are eligible for automatic execution at the opening price of the New York market, unless,

⁶ The Commission's Division of Market Regulation (the "Division") issued two no-action letters (the "Two No-Action Letters") regarding broker-dealer marking requirements under Rule 200(g) of Regulation SHO. See Letter from James A. Brigagliano, Assistant Director, Securities and Exchange Commission, to Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association, dated January 3, 2005 and letter from James A. Brigagliano, Assistant Director, Commission, to Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association, dated April 15, 2005. As used in this proposed rule change, Short Sale Exempt Securities means those securities traded on the Phlx and described in one of the Two No-Action Letters.

⁷ PACE is the Exchange's automated order routing, delivery, execution and reporting system for equities. See Phlx Rule 229.

among other things, those orders are marked sell short.⁸ According to the Phlx, the reason for not automatically executing orders marked sell short is to prevent a possible violation of the tick test in Rule 10a-1 under the Act⁹ if an order marked sell short were executed on an impermissible tick. However, in 2005, the Division issued Two No-Action Letters, which allowed broker-dealers, such as Phlx member organizations, to mark sell short orders in Short Sale Exempt Securities that are not subject to any other exemption as “sell short” instead of “sell short exempt” if those orders were sent to exchanges which, among other things, “have instituted procedures to ‘mask’ the short sale character of the transaction so they are executed as short exempt.”¹⁰ The Phlx has implemented such procedures to mask the short sale character of transactions in Short Sale Exempt Transactions so they are executed as short exempt. The Phlx notes that, therefore, in reliance on the Two No-Actions Letters, Phlx member organizations can mark such orders “sell short”.

Accordingly, in accordance with the Division’s Two No-Action Letters, eligible sell short orders received prior to the opening in Short Sale Exempt Securities could now, by law, be automatically executed on the Phlx without applying the tick test. However, pursuant to Phlx’s own rules, Phlx Rule 229, Supplementary Material .06 and .10(a)(iv), orders marked “sell short exempt” are eligible for automatic execution and orders marked “sell short” are not.

⁸ See Securities Exchange Act Release No. 52495 (September 22, 2005), 70 FR 56961 (September 29, 2005) (SR-Phlx-2005-14).

⁹ 17 CFR 240.10a-1.

¹⁰ See the Two No-Action Letters.

The Phlx now proposes to interpret Phlx Rule 229, Supplementary Material .06 and .10(a)(iv) to consider orders in Short Sale Exempt Securities that are marked sell short as if they were marked sell short exempt. The Phlx, therefore, notes that such orders in Short Sale Exempt Securities that are marked sell short, if otherwise eligible, would execute automatically, pursuant to Phlx Rule 229, Supplementary Material .06 and .10(a)(iv). The Phlx believes that this interpretation conforms to the intention of member organizations entering orders marked sell short in Short Sale Exempt Securities, because, relying on the Two No-Action Letters, such member organization would expect such order to be treated as if it were, in fact, marked sell short exempt.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act¹¹ in general, and furthers the objectives of Section 6(b)(5) of the Act¹² in particular, in that it is 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, by treating orders entered by member organizations in a manner consistent with their expectations.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

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 foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and paragraph (f)(1) of Rule 19b-4 thereunder. 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 proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2006-19 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number [SR-Phlx-2006-19](#). This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 the filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number [SR-Phlx-2006-19](#) and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Nancy M. Morris
Secretary

¹³ 17 CFR 200.30-3(a)(12).