

**SECURITIES AND EXCHANGE COMMISSION**  
**(Release No. 34-51731; File No. SR-Phlx-2005-02)**

**May 24, 2005**

**Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing of a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to Volume Weighted Average Price Crosses**

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on January 25, 2005, the Philadelphia Stock Exchange, Inc. (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission” or “SEC”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Phlx. On May 4, 2005, the Phlx submitted Amendment No. 1 to the proposed rule change,<sup>3</sup> and on May 18, 2005, the Phlx submitted Amendment No. 2 to the proposed rule change.<sup>4</sup> 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 amend Phlx Rule 126, “Crossing” Orders, by adding new subsection (i) dealing with volume weighted average price (“VWAP”) crosses. The text of amended Phlx Rule 126 is set forth below. New language is italicized.

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

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

<sup>3</sup> In Amendment No. 1, the Phlx (1) eliminated the concept of linking a VWAP cross to a “primary market” and instead proposed to link a VWAP cross to correspond to any single market, and (2) requested relief from the provisions of SEC Rule 11Ac1-1 under the Act (the “Quote Rule”) with respect to VWAP crosses.

<sup>4</sup> In Amendment No. 2, the Phlx (1) eliminated the proposed rule text addressing the treatment of VWAP crosses in the case of trading halts, (2) corrected a citing reference to Phlx auction market rules, and (3) clarified the description of the “b” modifier.

Rule 126.

“Crossing” Orders

When a member has an order to buy and an order to sell the same security, he must offer such security at a price which is higher than his bid by the minimum variation permitted in such security before making a transaction with himself.

Supplementary Material:

(a) - (h) No Change.

(i) This section applies to the execution of certain transactions hereinafter referred to as VWAP crosses which are customer-to-customer crosses that are equal to any single market or consolidated market volume weighted average prices either for the entire trading day from 9:30 A.M. to 4:00 P.M., or for any portion of the trading day. VWAP crosses are not subject to the Exchange’s auction market rules and thus, may not be broken-up upon entry to the Exchange. VWAP crosses must be identified as VWAP on each order ticket, entered by symbol and price, identified as ‘agency’ and, when applicable, identified as “short exempt”. The basis upon which the VWAP is to be calculated (including the time of day in which the trades to be included in the VWAP formula must occur, and whether such trades are limited to those occurring on a particular market or include all trades on the consolidated market) must be documented upon receipt of the order. VWAP crosses may be executed only during the Exchange’s Post Primary Session and reported with the identifier “b”, to the nearest decimal eligible for reporting by the Exchange.

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## **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, as amended, 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 Exchange represents that the purpose of the proposed rule change is to permit certain customer-to-customer<sup>5</sup> crosses to be executed at a VWAP<sup>6</sup> during the Exchange’s Post Primary Session.<sup>7</sup> The new crossing transactions would be permitted to be executed at prices which are equal to any single market or consolidated market volume weighted average prices calculated for the entire trading day from 9:30 A.M. to 4:00 P.M., or for any portion of the trading day, as may be agreed to by the two parties to the trade. These trades would therefore not be subject to

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<sup>5</sup> Pursuant to Phlx Rule 126(d) a “customer” order would include any order which a broker represents in an agency capacity, including any order of a market maker or other broker-dealer not affiliated with the broker, and it would not include any order of a broker-dealer affiliated with the executing broker, or any associated person of such broker-dealer.

<sup>6</sup> The Commission has observed that the VWAP for a security is generally determined by: (1) calculating raw values for regular session trades reported by the Consolidated Tape during the regular trading day by multiplying each such price by the total number of shares traded at that price; (2) compiling an aggregate sum by adding each calculated raw value from step one above; and (3) dividing the aggregate sum by the total number of reported shares for that day in the security. See Securities Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972, 62982 at n. 88 (Nov. 6, 2003) (the Regulation SHO Proposing Release). Pursuant to the Exchange’s proposed rule change, however, members would be able to elect to calculate a VWAP using only a single market’s prices rather than all trades reported by the Consolidated Tape, and could elect to base that calculation on trades reported during a particular time slice during the day rather than including all trades reported during the regular trading day. Members would be required to document the particular trades they have agreed to be used in the calculation.

<sup>7</sup> According to Phlx Rule 101, the Post Primary Session (“PPS”) operates from 4:00 to 4:15 P.M.

Exchange Rules 118, 119, and 120,<sup>8</sup> which collectively establish auction market rules of priority, parity and precedence of orders on the equity floor.

For example, assume that a floor broker receives in the morning an order to sell 10,000 XYZ at the VWAP calculated based upon transactions reported in the consolidated market between noon and 2:00 P.M. later that day. The floor broker would immediately complete an order ticket with the details of the proposed trade, including the time the order was placed and an identification of the transaction as a “VWAP” trade. The floor broker would also prepare a document memorializing the basis upon which the VWAP is to be calculated (i.e., the VWAP of transactions reported in the consolidated market between noon and 2:00). Thereafter, the floor broker would perhaps contact other institutional clients and inform them of an indication of interest to sell XYZ security during the Post Primary Session at the specified VWAP. Once the floor broker located a buyer for the transaction, he would generate an order ticket for the buyer by entering the time the order was placed and identifying the trade as a “VWAP” trade to be executed at the stipulated VWAP. During the Post Primary Session, the two orders would be crossed and the trade would be executed at the stipulated VWAP and reported to clearing and the tape at that price. Pursuant to the proposed rule change, the trade would be reported to the tape with the identifier “b” to the nearest decimal eligible for reporting by the Exchange. The “b” would distinguish VWAP trades from other transactions that may possibly be reported after the close.<sup>9</sup>

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<sup>8</sup> See Amendment No. 2, supra note 4 (deleting a reference to Phlx Rule 123).

<sup>9</sup> See Securities Exchange Act Release Nos. 41210 (Mar. 24, 1999), 64 FR 15857 (Apr. 1, 1999) (approving Phlx’s pilot program for the Volume Weighted Average Price Trading System and stating that trades thereunder will be reported to the Consolidated Tape System with the sale condition “B” to indicate volume weighted average pricing); and 41606 (July 8, 1999), 64 FR 38226 (July 15, 1999) (stating that rules governing reporting of transactions in Nasdaq securities contain a provision whereby a firm may aggregate transactions at the same price that would be impractical to report individually, provided that no individual order of 10,000 shares or more may

Under Commission Rule 10a-1 under the Act,<sup>10</sup> absent an exemption, a short sale of a security registered on a national securities exchange and reported in the consolidated reporting system may not be effected at a price either (1) below the last reported price of a transaction reported in such system (“minus tick”) or (2) at the last reported price if such price is lower than the previously reported different price (“zero minus tick”). This is known as the “tick test.” Because VWAP crosses are executed at a price that is based on the VWAP of trades during a particular time of day and executed in the Post Primary Session, it is possible that some VWAP crosses may not comply with the tick test because the VWAP cross price of a security may represent a minus tick or zero-minus tick with respect to the last sale reported by the Consolidated Tape. Thus, the Exchange intends also to apply to the Commission for exemptive relief from the tick test provisions of SEC Rule 10a-1 for crosses with a short sale component executed pursuant to new Phlx Rule 126(i).<sup>11</sup> The Exchange is also requesting relief from the provisions of Commission Rule 11Ac1-1 under the Act<sup>12</sup> (the “Quote Rule”) with respect to VWAP crosses.

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be aggregated, and that these reports have a “.B” modifier appended by the reporting firm and are disseminated to the Nasdaq tape and vendors). In the past, the Exchange reported trades in the Volume Weighted Average Price Trading System to the Consolidated Tape System with the sale condition “B” to indicate volume weighted average pricing (the “B” distinguished VWAP trades from other transactions that may have possibly been reported after the close such as after-hours, crossing session, or late sales transactions). The Exchange no longer uses the Volume Weighted Average Price Trading System, so there is no chance that VWAP Crosses identified with a “b” sale condition will be confused with Volume Weighted Average Price Trading System trades. See Amendment No. 2, supra note 4.

<sup>10</sup> 17 CFR 240.10a-1.

<sup>11</sup> See Draft letter from Carla Behnfeldt, Director, Legal Department New Product Development Group, Phlx, to Larry E. Bergmann, Senior Associate Director, Division of Market Regulation, Commission, dated February 3, 2005.

<sup>12</sup> 17 CFR 240.11Ac1-1.

## 2. **Statutory Basis**

The Exchange believes that the proposal is consistent with Section 6(b) of the Act<sup>13</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>14</sup> in particular, in that it affords market participants a new means of executing transactions at a VWAP, thereby enhancing investors' choices.

### 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 by the Exchange.

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

Within 35 days of the date of 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 Exchange consents, the Commission shall:

- A. by order approve such proposed rule change, as amended; or
- B. institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

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<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(5).

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2005-02 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-Phlx-2005-02. 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, as amended, 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-2005-02 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.<sup>15</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>15</sup> 17 CFR 200.30-3(a)(12).