

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-55044; File No. SR-Phlx-2006-92)

January 5, 2007

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Use of Benchmark and Qualified Contingent Trades in Nasdaq Securities Before the Trading Phase Date of Regulation NMS

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 December 28, 2006 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 substantially prepared by the Phlx. The Exchange filed the proposal as a “non-controversial” rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which rendered 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 proposes to amend Phlx Rule 185A to add two paragraphs reflecting that Phlx will accept Immediate-or-Cancel (“IOC”) Cross Orders marked as Benchmark and IOC Cross Orders marked as Qualified Contingent Trade, both for Nasdaq Global Market Securities and Nasdaq Capital Market Securities (“Nasdaq Securities”) before Rule 611 of Regulation NMS is

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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> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

operative on the Exchange (the “Trading Phase Date”).<sup>5</sup> In addition, the modified rule clarifies the requirements for IOC Cross Orders marked as Benchmark and IOC Cross Orders marked as Qualified Contingent Trade for Nasdaq Securities before the Trading Phase Date. In addition, the title of Phlx Rule 185A is amended to reflect the subject matter of the rule. Finally, the paragraphs of the rule are being individually identified. The text of the proposed rule change is available at Phlx, the Commission’s Public Reference Room, and [www.phlx.com](http://www.phlx.com).

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 clarify the requirements for IOC Cross Orders marked Benchmark or Qualified Contingent Trade in Nasdaq Securities on XLE before the Trading Phase Date. Currently, Phlx Rule 185(c)(3) states “[a]n IOC Cross Order may be marked Benchmark if it meets the requirements of Reg NMS Rule 611(b)(7). An IOC Cross Order may be marked Qualified Contingent Trade if it meets the requirements of an exemption to Reg NMS Rule 611.” Also, Phlx Rule 185(c)(2)(D) states that IOC Cross Orders marked Benchmark or Qualified Contingent Trade are permitted to trade through the price of the

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<sup>5</sup> The Trading Phase Date is currently February 5, 2007. See Securities Exchange Act Release No. 53829 (May 18, 2006), 71 FR 30038 (May 24, 2006).

Protected NBBO.<sup>6</sup> In addition, IOC Cross Orders marked Benchmark may be entered<sup>7</sup> and executed<sup>8</sup> in sub-penny increments.<sup>9</sup> However, the reference to “Reg NMS Rule 611” in Phlx Rule 185(c)(3) may be unclear in light of the fact that Rule 611 of Regulation NMS is effective, but not operative until the Trading Phase Date. Phlx also notes that the use of these orders in Nasdaq Securities does not require any relief from any National Market System Plans because there is no intermarket trade through prohibition in Nasdaq Securities before the Trading Phase Date.

Pursuant to this filing, a XLE Participant could submit an IOC Cross Order marked Benchmark in Nasdaq Securities if it is an order: (1) at a price that was not based, directly or indirectly, on the quoted price of the NMS Stock at the time of the execution; and (2) for which the material terms were not reasonably determinable at the time the commitment to execute the order was made. This definition is identical to the exemption to the trade through rule in Rule 611(b)(7) of Regulation NMS, which is not effective until the Trading Phase Date. Phlx believes that this will allow XLE Participants to gain valuable experience with this order type in Nasdaq Securities prior to the Trading Phase Date.

In addition, a XLE Participant could submit an IOC Cross Order marked Qualified Contingent Trade in Nasdaq Securities if it meets the seven requirements listed in new Phlx Rule

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<sup>6</sup> See Phlx Rule 185(c)(2)(D). See also Phlx Rule 1(dd) (defining “Protected NBBO” as the best Protected Bid and the best Protected Offer in a stock).

<sup>7</sup> See Phlx Rule 125(b)(2).

<sup>8</sup> See Phlx Rule 125(d)(3).

<sup>9</sup> See Securities Exchange Act Release No. 54678 (October 31, 2006), 71 FR 65018 (November 6, 2006).

185A(d).<sup>10</sup> These requirements are meant to encompass a trade in Nasdaq Securities that “is a multi-component trade involving orders for a security and a related derivative, or, in the alternative, orders for related securities, that are executed at or near the same time.”<sup>11</sup> The Exchange notes that the economics of a Qualified Contingent Trade are based on the relationship between the prices of the security and the related derivative or security, and that the execution of one order is contingent upon the execution of the other order. The Exchange also notes that the sought-after spread or ratio between the relevant instruments is known and specified at the time of the order, and this spread or ratio stands regardless of the prevailing price at the time of execution. Therefore, the parties to these transactions are focused on the spread or ratio between the transaction prices for each of the component instruments, rather than on the absolute price of any single component instrument. Because the focus of such trades is on the relative prices of the component instruments, the price of a component of a particular trade may or may not correspond to the prevailing market price of the security. For Qualified Contingent Trades in Nasdaq Securities, the parties to the trade will not execute one side of the trade without the other component or components being executed in full (or in ratio) and at the specified spread or ratio.<sup>12</sup>

Finally, Phlx Rule 185A is being divided into individually identified subparagraphs to make the Rule clearer. In addition, the name of the rule is being modified to reflect that the rule would refer to more than only intermarket sweep orders.

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<sup>10</sup> These seven requirements are taken from the exemption to Rule 611 issued by the Commission for Qualified Contingent Trades. See Securities Exchange Act Release No. 54389 (August 31, 2006), 71 FR 52829 (September 7, 2006).

<sup>11</sup> Id.

<sup>12</sup> See id.

## 2. Statutory Basis

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 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 allowing XLE Participants to gain experience with Benchmark and Qualified Contingent Trade order types for Nasdaq Securities prior to the Trading Phase Date.

### 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 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

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

Because the foregoing rule (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the Exchange has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission, the proposed rule

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

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

change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>15</sup> and Rule 19b-4(f)(6) thereunder.<sup>16</sup> As required under Rule 19b-4(f)(6)(iii) under the Act,<sup>17</sup> Phlx provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, prior to the date of the filing of the proposed rule change.

A proposed rule change filed under Rule 19b-4(f)(6) under the Act<sup>18</sup> normally may not become operative prior to 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii) under the Act<sup>19</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay, which would make the rule change effective and operative upon filing. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change clarifies the requirements of an IOC Cross Order marked Benchmark in Nasdaq Securities and an IOC Cross Order marked Qualified Contingent Trade in Nasdaq Securities for the period before the Trading Phase Date. The Commission believes that the earlier operative date is consistent with the protection of investors and the public interest because there is no intermarket trade-through prohibition applicable to Nasdaq Securities before the Trading Phase Date. Accordingly, the

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

<sup>16</sup> 17 CFR 240.19b-4(f)(6).

<sup>17</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>18</sup> 17 CFR 240.19b-4(f)(6).

<sup>19</sup> 17 CFR 240.19b-4(f)(6)(iii).

Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>20</sup>

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.<sup>21</sup>

#### 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](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2006-92 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-2006-92. 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

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<sup>20</sup> For the purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>21</sup> See 15 U.S.C. 78s(b)(3)(C).

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-2006-92 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>22</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>22</sup> 17 CFR 200.30-3(a)(12).