

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50946; File No. SR-Phlx-2004-87)

December 29, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Philadelphia Stock Exchange, Inc. Relating to Amending Phlx Rule 1072 in View of Commission Regulation SHO

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 December 3, 2004, 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. On December 27, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.³ The proposed rule change, as amended, was filed by the Exchange as a non-controversial filing under Rule 19b-4(f)(6) of the Act.⁴ 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Amendment No. 1 to the proposed rule change (December 27, 2004). Amendment No. 1 replaced the Exchange's original filing in its entirety.

⁴ 17 CFR 240.19b4(f)(6). For purposes of determining the effective date and calculating the sixty-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers that period to commence on December 28, 2004, the date the Exchange filed Amendment No. 1. See 15 U.S.C. 78s(b)(3)(C).

The Phlx, pursuant to Section 19(b)(1) and Rule 19b-4 thereunder,⁵ proposes to amend Phlx Rule 1072 in view of the recent adoption of Regulation SHO.⁶ New text is italicized; deleted text is bracketed.

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Rule 1072.

Reporting Requirements Applicable to Short Sales in NASD/NM Securities

This Rule is adopted in conjunction with the adoption of an addition to the Rules of Fair Practice of the NASD which imposes a bid test on short sales of stocks traded on the Nasdaq National Market subject to certain exemptions including, during a pilot period, an exemption for certain transactions of options market makers. This Rule will continue in effect only so long as the options market maker exemption from the NASD bid test remains in effect.

(a) No member shall initiate, accept or transmit for execution, or execute a sale of a Nasdaq National Market ("NM") security for its own account or for the account of another member unless the sale is clearly identified in a form and manner prescribed by the [Exchange as a long sale, short sale or bid test example sale] Securities and Exchange Commission's ("SEC") Rule 200 under the Securities Exchange Act of 1934 promulgated pursuant to Regulation SHO ("SEC Rule 200").

(b) For purposes of this Rule, a short sale shall have the same meaning as set forth in SEC Rule [3b-3 under the Securities Exchange Act of 1934] 200.

⁵ 17 CFR 240.19b-4.

⁶ Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (August 6, 2004).

(c) through (f): No Change.

(g) Notwithstanding the foregoing, this Rule 1072 shall not be applicable to any short sales for which the SEC has suspended short sale price tests pursuant to its Rule 202T, including any short sales covered by the SEC's Pilot Program suspending certain short sale price provisions at Exchange Act Release No. 50104 (July 28, 2004), or any SEC amendment(s) of the same.

Commentary .01: No Change.

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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 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 conform the Exchange's Rule 1072 to recent Commission actions in the area of short sale regulation.

On July 28, 2004, the Commission published two releases making changes to the Commission's rules governing short sales. In the first release,⁷ the Commission adopted

⁷ Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (August 6, 2004).

new Regulation SHO under the Securities Exchange Act of 1934, thereby replacing SEC Rules 3b-3⁸ and 10a-2⁹ and amending SEC Rule 10a-1.¹⁰ In particular, SEC Rule 3b-3 was replaced by new SEC Rule 200,¹¹ which defines “short sales” and requires brokers and dealers to mark sales in all equity securities “long,” “short,” or “short exempt.” In the second release,¹² the Commission promulgated a pilot program pursuant to new SEC Rule 202T, which suspended the tick test provision of SEC Rule 10a-1 and any short sale price test of any exchange or national securities association with respect to certain securities, for a period of approximately one year beginning on January 3, 2005 (“Short Sale Pilot Program”), which beginning date the Commission extended to May 2, 2005 by order of November 29, 2004.¹³ In particular, the Short Sale Pilot Program suspended tick and national securities association price tests for 1000 of the securities in the Russell 3000 index. In view of these developments in the area of short sale regulation, the Exchange is proposing several amendments to Phlx Rule 1072 related to short sales.

Phlx Rule 1072(a) currently provides that Exchange members can not engage in transactions of Nasdaq National Market (NM) securities unless they are clearly identified

⁸ 17 CFR 240.3b-3.

⁹ 17 CFR 240.10a-2.

¹⁰ 17 CFR 240.10a-1.

¹¹ 17 CFR 240.200.

¹² Securities Exchange Act Release No. 50104 (July 28, 2004), 69 FR 48032 (August 6, 2004).

¹³ Although the Commission’s order resets the Short Sale Pilot Program to commence on May 2, 2005 and end on April 28, 2006, all other terms of the pilot program remain unchanged. See Securities Exchange Act Release No. 50747 (November 29, 2004).

in a form and manner prescribed by the Exchange. The proposed amendment to Rule 1072(a) clarifies that such transactions must be identified as prescribed by SEC Rule 200. Phlx Rule 1072(b) currently states that a short sale will have the meaning set forth in SEC Rule 3b-3. The proposed amendment to Rule 1072(b) adds a reference to SEC Rule 200 and deletes reference to SEC Rule 3b-3. Finally, an amendment proposes to add new section (g) to Rule 1072 to make clear that the provisions of the rule will not apply to any short sales for which the Commission suspends short sales price tests pursuant to its Rule 202T, including the Short Sale Pilot Program. These changes are intended to update Rule 1072 to reflect Regulation SHO.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act¹⁴ in general, and furthers the objectives of Section 6(b)(5) of the Act¹⁵ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and to perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. Specifically, the proposed rule change conforms Exchange options rule procedures to new Commission releases, rules, and a pilot program relating to short sales.

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

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(5).

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 is being designated by the Exchange as a "non-controversial" rule pursuant to Section 19(b)(3)(A) of the Act and subparagraph (f)(6) of Rule 19b-4 thereunder, because the proposed rule change: (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for thirty 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. Therefore, it has become effective pursuant to Section 19(b)(3)(A)¹⁶ of the Act and Rule 19b-4(f)(6)¹⁷ thereunder. The Exchange requests that the Commission waive the 30-day pre-operative delay requirement contained in Rule 19b-4(f)(6)(iii),¹⁸ so that the proposed rule change may become operative on January 3, 2005, the compliance date for Regulation SHO. The Exchange is for similar reasons requesting that the five business day pre-filing period be waived in order to file by December 3, 2004.

The Commission believes that waiving the 5-day notice and 30-day pre-operative delay is consistent with the protection of investors and the public interest. The Commission believes that accelerating the operative date does not raise any new

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f)(6).

¹⁸ Under subparagraph (f)(6)(iii) of Rule 19b-4, the proposal may not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. 17 CFR 240.19b-4(f)(6)(iii).

regulatory issues, significantly affect the protection of investors or the public interest, or impose any significant burden on competition. For these reasons, the Commission designates the proposed rule change effective and operative immediately.

At any time within 60 days of the filing of a rule change pursuant to Section 19(b)(3)(A) of the Act, the Commission may summarily abrogate the 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.

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-2004-87 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-2004-87. 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-2004-87 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.¹⁹

Margaret H. McFarland
Deputy Secretary

¹⁹ 17 CFR 200.30-3(a)(12).