

Securities to eVWAP. Ashton stated that many eVWAP participants have requested the addition of Nasdaq issues for eVWAP matching.

Ashton also responded to the Knight Letter. In the Ashton Letter, Ashton counters two of Knight's arguments by contending that: (1) The SEC has already determined that UTP trading of Nasdaq/NM securities is in furtherance of fair and orderly markets; and (2) the federal statutory and regulatory scheme dictates that self-regulatory organizations' rules govern their own members (Ashton questions whether Knight is requesting a complete overhaul of the Act to impose a single self-regulatory, NASDR, over all market participants trading Nasdaq/NM Securities).

IV. Discussion

The Commission finds that the proposed rule change, as needed, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with the requirements of section 6(b)(5) of the Act.¹⁶ The Commission believes that Phlx has proposed rules that should ensure that trading in Nasdaq/NM Securities on its floor occurs in an orderly fashion,¹⁷ consistent with the requirements of the Act. The Commission, therefore, believes that the proposal should remove impediments to and perfect the mechanism of a free and open market in a manner that is consistent with the protection of investors and the public interest.¹⁸ The Commission also notes that Phlx's response to the comments raised in the Knight Letter were sufficient.¹⁹

¹⁶ 15 U.S.C. 78f(b)(5).

¹⁷ The Commission notes that trading in Nasdaq/NM Securities will occur on the Phlx's equity floor, which is separate from the Phlx's options floor. Therefore, Phlx's proposal does not raise any side-by-side trading concerns. In addition, Phlx Rule 1014, which prohibits Registered Options Traders ("ROTs") from executing proprietary options transactions in Phlx-listed options on OTC securities, if, during the preceding hour, the ROT was physically at the trading post where such OTC security trades, will apply during the Pilot.

¹⁸ In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁹ The Commission notes that the Phlx's rules regarding short sales do not require an exemption from the Commission's short sale rule, Rule 10a-1, since Nasdaq securities currently are excluded from the Rule. See CFR 240.10a-1(a)(ii). However, Nasdaq has applied to become a national securities exchange. See Securities Exchange Act Release No. 44396 (June 7, 2001), 66 FR 31952 (June 13, 2001). If Nasdaq becomes a registered exchange, Nasdaq securities will be exchange-listed and the exemption in subparagraph (ii) of Rule 10a-1 will no longer be available. Accordingly, trading in Nasdaq securities would be subject to Rule 10a-1 unless Phlx obtains an exemption from the Rule.

Furthermore, the proposed rule change is consistent with section 12(f)(2) of the Act,²⁰ which grants the Commission explicit authority to approve UTP in OTC securities. Section 12(f)(2) of the Act requires the Commission, before approving UTP, to determine that the granting of UTP is consistent with the maintenance of fair and orderly markets and the protection of investors. The Commission believes that the proposed rule change is consistent with these goals and thus, the Commission is approving the proposed rule change, subject to the Phlx complying with the requirements of the OTC/UTP Plan.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,²¹ that the proposed rule change (SR-Phlx-2000-20), as amended, is approved on a pilot basis effective for a six month period beginning on the date trading begins.²²

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²³

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45178; File No. SR-PHLX-00-68]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change and Amendment Nos. 1, 2, and 3 by the Philadelphia Stock Exchange, Inc. Related to Generic Listing Standards Applicable to Trust Shares Pursuant to Rule 19-4(e) Under the Securities Exchange Act of 1934

December 20, 2001.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 7, 2000, the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") filed with the Securities and Exchange Commission

The Commission notes that Nasdaq has requested an exemption from Rule 10a-1.

²⁰ 15 U.S.C. 781(f)(2).

²¹ 15 U.S.C. 78s(b)(2).

²² Phlx has advised the Commission that it expects to begin trading in January 2002.

²³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the PHLX. The PHLX filed Amendment Nos. 1, 2, and 3 to the proposal on September 7, 2000,³ September 12, 2001,⁴ and December 18, 2001,⁵ respectively. The Commission is

³ See letter from Carla Behnfeldt, Director, Legal Department New Product Development Group, PHLX, to Nancy Sanow, Division of Market Regulation ("Division"), Commission, dated September 26, 2000 ("Amendment No. 1"). In Amendment No. 1, the PHLX indicated that in the event the PHLX proposes to list and trade a series of Trust Shares that do not satisfy the generic criteria provided in the proposal, the PHLX will submit to the Commission a proposed rule change pursuant to Rule 19b-4 with respect to the series.

⁴ See letter from Carla Behnfeldt, Director, Legal Department New Product Development Group, PHLX, to Yvonne Fraticelli, Special Counsel, Division, Commission, dated September 12, 2001 ("Amendment No. 2"). Amendment No. 2 indicates that: (1) The PHLX currently does not list any Trust Shares, although it trades shares of the Nasdaq 100 Trust pursuant to unlisted trading privileges ("UTP"); (2) the PHLX is amending PHLX Rule 803(i)(11)(e) to indicate that the minimum trading increment for a series of Trust Shares will be \$0.01; (3) the PHLX will issue a circular to members for each Trust Shares series listed pursuant to Rule 19b-4(e) under the Act, which will describe the unique characteristics and risks of Trust Shares, and inform members of any obligation to deliver a written product description or prospectus, as applicable to purchasers of Trust Shares, and inform members of their responsibilities under PHLX Rules 746, "Diligence as to Accounts," and 747, "Approval of Accounts," in connection with customer transactions in Trust Shares; (4) Trust Shares are subject to, among others, the PHLX's general agency-auction rules, trading rules, clearance and settlement rules, equity margin rules, priority, parity, and precedence rules, rules governing the responsibilities of specialists, trading halt rules and procedures, and account opening requirements; (5) any series of Trust Shares traded pursuant to the standards in PHLX Rule 803(i)(11) must meet the eligibility criteria in PHLX Rule 803(i)(11) as of the date of the initial deposit of securities and cash into the trust; (6) the initial deposit of a specified portfolio of securities in connection with the issuance of shares of a series of Trust Shares must be made before the start of trading on the PHLX; (7) unless the PHLX maintains an index, the current index value will be disseminated every 15 seconds over the Consolidated Tape Association's ("CTA") Network B by or through the primary exchange or an entity working with that exchange; and (8) Trust Shares are subject to PHLX Rules 133, "Trading Halts Due to Extraordinary Market Volatility," and 136, "Trading Halts in Certain Exchange Traded Funds."

⁵ See letter from Carla Behnfeldt, Director, Legal Department New Product Development Group, PHLX, to Yvonne Fraticelli, Special Counsel, Division, Commission, dated December 17, 2001 ("Amendment No. 3"). In Amendment No. 3, the PHLX revised the text of PHLX Rule 803(i)(11) to indicate: (1) that the provisions of PHLX Rule 803(i)(11) apply to Trust Shares listed or traded pursuant to UTP; and (2) that the minimum trading increment for Trust Shares will be \$0.01. In addition, in Amendment No. 3 the PHLX represented that it will use its existing surveillance procedures for Trust Shares to monitor trading in Trust Shares traded pursuant to Rule 19b-4(e). Amendment No. 3 also stated that the PHLX will issue a circular to members for each Trust Shares series listed or traded on a UTP basis pursuant to Rule 19b-4(e) under the Act, and reiterated the

publishing this notice to solicit comments on the proposed rule change and on Amendment Nos. 1, 2, and 3 from interested persons and to approve the proposal, as amended, on an accelerated basis.

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

The PHLX proposes to amend PHLX Rule 803(i), "Trust Shares," by adopting PHLX Rule 803(i)(11), which will provide standards to permit the trading, whether by listing or pursuant to UTP, of Trust Shares pursuant to Rule 19b-4(e) under the Act.⁶

The text of the proposed rule change is available at the PHLX and at the Commission.

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 III 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

PHLX Rule 803(i) accommodates the trading on the PHLX of Trust Shares, which represent interests in a unit investment trust ("Trust") that operates on an open-end basis and holds a portfolio of securities. Each Trust is designed to provide investors with an instrument that closely tracks the underlying securities portfolio, trades like a share of common stock, and pays to holders of Trust Shares periodic dividends proportionate to those paid with respect to the underlying portfolio of securities, less expenses, as described in the applicable Trust prospectus.

statements made in Amendment No. 2 concerning the information that the circular will provide.

⁶ 17 CFR 240.19b-4(e). Rule 19b-4(e) under the Act permits self-regulatory organizations ("SROs") to list and trade new derivatives products that comply with existing SRO trading rules, procedures, surveillance programs and listing standards without submitting a proposed rule change under section 19(b) of the Act. See Securities Exchange Act Release No. 40761 (December 8, 1998), 63 FR 70952 (December 22, 1998) ("1998 Release").

The PHLX proposes to amend PHLX Rule 803(i) by adopting proposed PHLX Rule 803(i)(11), which will provide standards to permit the listing and trading, including trading on a UTP basis, of Trust Shares pursuant to rule 19b-4(e) under the Act. Rule 19b-4(e) states that the listing and trading of a new derivative securities product by a SRO shall not be deemed a proposed rule change if the Commission has approved, pursuant to Section 19(b) of the Act,⁷ the SRO's trading rules, procedures, and listing standards for the product class that would include the new derivative securities product and the SRO has a surveillance program for the product class.⁸

The PHLX adopted PHLX Rule 803(i) to permit the listing and trading of Trust Shares.⁹ Under PHLX Rule 803(i), the PHLX had anticipated filing proposed rule changes pursuant to Rule 19b-4 under the Act for each series of Trust Shares to be traded on the PHLX. The PHLX now believes, however, that the adoption of proposed PHLX Rule 803(i)(11) will further the intent of PHLX Rule 803(i) by facilitating the commencement of trading in Trust Shares, subject to the generic standards for Trust Shares in proposed PHLX Rule 803(i)(11), without the need for notice and comment and Commission approval under Section 19(b) of the Act. The PHLX believes that this has the potential to reduce the time frame for bringing Trust Shares to market.

The PHLX proposes that Trust Shares listed or traded on a UTP basis pursuant to Rule 19b-4(e) be subject to the specific generic criteria set forth in proposed PHLX Rule 803(i)(11). The PHLX notes that all other provisions of PHLX Rule 803(i) would continue to apply to such securities.

Proposed PHLX Rule 803(i)(11) sets forth generic listing criteria that are intended to ensure that a substantial portion of the weight of an index or portfolio underlying Trust Shares is accounted for by stocks with substantial market capitalization and trading volume. Proposed PHLX Rule 803(i)(11) provides that, upon the initial listing of a series of Trust Shares pursuant to Rule 19b-4(e), the component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio must

have minimum market value of at least \$75 million. In addition, the component stocks in the index or portfolio must have a minimum monthly trading volume during each of the last six months of at least 250,000 shares for stocks representing at least 90% of the weight of the index or portfolio.

The most heavily weighted component stock in an underlying index cannot exceed 25% of the weight of the index or portfolio, and the five most heavily weighted component stocks cannot exceed 65% of the weight of the index or portfolio. The underlying index or portfolio must include a minimum of 13 stocks, which is the minimum number to permit qualification as a regulated investment company under subchapter M of the Internal Revenue Code. All securities in an underlying index or portfolio must be listed on a national securities exchange or the Nasdaq Stock Market (including the Nasdaq SmallCap Market).

Any series of Trust Shares traded pursuant to the standards in proposed PHLX Rule 803(i)(11) must meet the eligibility criteria in proposed PHLX Rule 803(i)(11) as of the date of the initial deposit of securities and cash into the trust.¹⁰ The PHLX will request issuers of a series of Trust Shares listed under PHLX Rule 803(i)(11) to represent to the PHLX that the index or portfolio of securities underlying the series will comply with the applicable eligibility criteria as of the date of the initial deposit.¹¹

Proposed PHLX Rule 803(i)(11) provides that the underlying index will be calculated based on either the market capitalization, modified market capitalization, price, equal-dollar, or modified equal-dollar weighting methodology. In addition, if the index is maintained by a broker-dealer, the broker-dealer must erect a "fire wall" around the personnel who have access to information concerning changes and adjustments to the index, and the index shall be calculated by a third party who is not a broker-dealer. The current index value must be disseminated every 15 seconds over the CTA's Network B.¹²

The Reporting Authority¹³ will disseminate for each series of Trust

¹⁰ See Amendment No. 2, *supra* note 4.

¹¹ See Amendment No. 2, *supra* note 4.

¹² Unless the PHLX maintains the index, the PHLX understands that the primary exchange or another entity working with that exchange will disseminate the current value of the index. See Amendment No. 2, *supra* note 4.

¹³ The Reporting Authority with respect to a series of Trust Shares is the PHLX, a wholly-owned subsidiary of the PHLX, an institution (including the Trustee for Trust Shares), or a reporting service designated by the PHLX or its subsidiary or by the

Continued

⁷ 15 U.S.C. 78s(b).

⁸ See 1998 Release, *supra* note 6.

⁹ See Securities Exchange Act Release No. 43717 (December 13, 2000), 65 FR 80976 (December 22, 2000) (order approving File No. SR-PHLX-00-54) ("Trust Shares Order"). The PHLX currently does not list any Trust Shares. The PHLX trades shares of the Nasdaq 100 Trust on a UTP basis pursuant to the Trust Shares Order. See Amendment No. 2, *supra* note 4.

Shares an estimate, updated every 15 seconds, of the value of a share of each series. This may be based, for example, upon the index value or upon current information regarding the required deposit of securities and cash to permit creation of new shares of the series.

Proposed PHLX Rule 803(i)(11)(d) provides that a minimum of 100,000 shares of a series of Trust Shares must be outstanding at the start-up of trading.¹⁴ The PHLX believes that this minimum number will be sufficient to establish a liquid PHLX market at the start of trading.

The minimum trading increment for a series of Trust Shares will be \$0.01.¹⁵

The original listing fee for each series of Trust Shares will be \$7,500, with an annual maintenance listing fee of \$1,250.

The PHLX represents that it will implement written surveillance procedures for Trust Shares and that it will use its existing surveillance procedures for Trust Shares to monitor trading in Trust Shares traded pursuant to Rule 19b-4(e).¹⁶ In addition, the PHLX states that it will comply with all of the recordkeeping requirements of Rule 19b-4(e) and that it will file Form 19b-4(e) for each series of Trust Shares listed under Rule 19b-4(e) within five business days of the commencement of trading.

The provisions of PHLX Rule 803(i)(11) will apply to all series of Trust Shares listed or traded on a UTP basis pursuant to Rule 19b-4(e). In addition to the requirements of proposed PHLX Rule 803(i)(11), Trust Shares also will be subject to other PHLX rules. Specifically, the PHLX notes that dealings in Trust Shares on the PHLX are conducted pursuant to the PHLX's general agency-auction trading rules.¹⁷ In addition, Trust Shares are subject to, among others, the general dealing and settlement rules of the PHLX, including the PHLX's rules on

clearance and settlement of securities transactions and the PHLX's equity margin rules; the PHLX's rules governing priority, parity, and precedence of orders; the PHLX's rules regarding responsibilities of the specialist; and the PHLX's account opening requirements.¹⁸

Trust Shares also are subject to PHLX Rule 133, "Trading Halts due to Extraordinary Market Volatility," and PHLX Rule 136, "Trading Halts in Certain Exchange Traded Funds."¹⁹ In exercising discretion under PHLX Rule 136, PHLX officials may consider a variety of factors, including the extent to which trading has been halted or suspended in the market that is the primary market for a plurality of the underlying stocks, and whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.²⁰

The PHLX will issue a circular to members for each series of Trust Shares listed, or traded on a UTP basis, pursuant to Rule 19b-4(e).²¹ The circular will describe the unique characteristics and risks of Trust Shares and will inform members of any obligation to deliver a written product description or prospectus, as applicable, to purchasers of Trust Shares.²² The circular will inform members of their responsibilities under PHLX Rule 746, "Diligence as to Accounts," and PHLX Rule 747, "Approval of Accounts," in connection with customer transactions in Trust Shares.²³

(2) Basis

The PHLX believes that the proposed rule change is consistent with Section 6(b) of the Act, in general, and furthers the objectives of Section 6(b)(5) of the Act, in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities, and, in general, to protect investors and the public interest.

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

The PHLX 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

Written comments were neither solicited nor received with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change and Amendment Nos. 1, 2, and 3 are 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 PHLX. All submissions should refer to file number SR-PHLX-00-68 and should be submitted by January 22, 2002.

IV. Commission Findings and Order Granting Accelerated Approval of Proposed Rule Change

The PHLX has asked the Commission to approve the proposal on an accelerated basis because the PHLX has proposed standards for Trust Shares that are substantially similar to those adopted by the American Stock Exchange, LLC ("Amex") for the listing and trading of Portfolio Depository Receipts ("PDRs") pursuant to Rule 19b-4(e).²⁴ The PHLX does not believe that its proposal presents any new investor protection issues that were not addressed during the notice and comment period for the Amex's

exchange that lists a particular series of Trust Shares (if the PHLX is trading a series of Trust Shares pursuant to UTP) as the official source for calculating and reporting information relating to the series, including any current index or portfolio value; the current value of the portfolio of securities required to be deposited to the Trust in connection with the issuance of Trust Shares; the amount of any dividend equivalent payment or cash distribution to holders of Trust Shares, net asset value or other information relating to the creation, redemption, or trading of Trust Shares. See PHLX Rule 803(i)(1)(ii).

¹⁴ The initial deposit of a specified portfolio of securities in connection with the issuance of the minimum of 100,000 shares of a series of Trust Shares must be made before the start of trading on the PHLX. See Amendment No. 2, *supra* note 4.

¹⁵ See Amendment Nos. 2 and 3, *supra* notes 4 and 5.

¹⁶ See Amendment No. 3, *supra* note 5.

¹⁷ See Amendment No. 2, *supra* note 4.

¹⁸ See Amendment No. 2, *supra* note 4.

¹⁹ See Amendment No. 2, *supra* note 4.

²⁰ See Amendment No. 2, *supra* note 4.

²¹ See Amendment Nos. 2 and 3, *supra* notes 4 and 5.

²² See Amendment Nos. 2 and 3, *supra* notes 4 and 5.

²³ See Amendment Nos. 2 and 3, *supra* notes 4 and 5.

²⁴ See Amex Rule 1000, Commentary .03. See also Securities Exchange Act Release No. 42787 (May 15, 2000), 65 FR 33598 (May 24, 2000) (order approving File No. SR-Amex-00-14) ("Amex Order"). The Amex Order also approved standards to permit the listing and trading of Index Fund Shares pursuant to the Rule 19b-4(e).

proposal to provide standards to permit the listing and trading of PDRs pursuant to Rule 19b-4(e).

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 and, in particular, with the requirements of Section 6(b)(5) of the Act²⁵ in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and, in general, to protect investors and the public interest.²⁶

Trust Shares are securities that are interests in a Trust that holds a portfolio of securities linked to an index. Each Trust is designed to provide investors with an instrument that closely tracks the underlying portfolio of securities, trades like a share of common stock, and pays holders of the instrument periodic dividends proportionate to those paid with respect to the underlying portfolio of securities, less certain expenses, as described in the Trust prospectus.²⁷

As noted above, the Commission previously approved a PHLX proposal that permits the listing and trading, or trading pursuant to UTP, of Trust Shares on the PHLX.²⁸ In approving these securities of trading, the Commission considered the structure of these securities, their usefulness to investors and to the markets, and the PHLX rules that govern their trading. The Commission's approval of the current proposal, which establishes generic listing standards for Trust Shares, will allow series of Trust Shares that satisfy the generic listing standards in PHLX Rule 803(i)(11) to begin trading under Rule 19b-4(e) without the need for notice and comment and Commission approval. As noted above, Rule 19b-4(e) provides that the listing and trading of a new derivative securities product by a SRO shall not be deemed a proposed rule change pursuant to Rule 19b-4(c)(1) if the Commission has approved, pursuant to Section 19(b) of the Act, the SRO's trading rules, procedures and listing standards for the product class that includes the new derivative securities product class, and the SRO has a surveillance program for the

product class.²⁹ The PHLX's ability to rely on Rule 19b-4(e) for Trust Shares potentially reduces the time frame for bringing Trust Shares to the market or for permitting the trading of Trust Shares pursuant to UTP, and thus enhances investors' opportunities. The Commission notes that while the proposal will reduce the PHLX's regulatory burden, the Commission maintains regulatory oversight over any products listed under the generic standards through regular inspection oversight.

The Commission also finds that the proposal contains adequate rules and procedures to govern the trading of Trust Shares under rule 19b-4(e). All series of Trust Shares listed under the generic standards will be subject to the full panoply of PHLX rules and procedures that would govern the trading of Trust Shares listed on the PHLX or traded pursuant to UTP. Accordingly, any series of Trust Shares listed and traded, or traded on a UTP basis, under rule 19b-4(e) would be subject to the PHLX rules governing the trading of equity securities including, among others, rules and procedures governing trading halts, disclosures to members, responsibilities of the specialist, account opening and customer suitability requirements, and margin.³⁰

In addition, the PHLX has developed specific listing criteria for series of Trust Shares qualifying for rule 19b-4(e) treatment that will help to ensure that a minimum level of liquidity will exist to allow for the maintenance of fair and orderly markets. The Commission believes that the proposed generic listing standards ensure that the securities composing the indexes and portfolios underlying Trust Shares are well capitalized and actively traded. These capitalization and liquidity criteria should serve to prevent fraudulent or manipulative acts involving Trust Shares.

In addition, all series of Trust Shares listed or traded under the generic standards will be subject to the PHLX's existing continuing listing criteria. This requirement will allow the PHLX to consider the suspension of trading and the delisting of a series if an event occurs that makes further dealing in such securities inadvisable. The Commission believes that this will give the PHLX flexibility to delist Trust Shares if circumstances warrant such action.

The PHLX will use its existing surveillance procedures for Trust Shares

to monitor trading in Trust Shares traded pursuant to Rule 19b-4(e).³¹ The Commission believes that these surveillance procedures are adequate to address concerns associated with listing and trading Trust Shares under the generic standards. In addition, the PHLX represents that it will file Form 19b-4(e) with the Commission within five business days of the commencement of trading a series under the generic standards, and will comply with all Rule 19b-4(e) recordkeeping requirements.

The Commission also notes that certain concerns are raised when a broker-dealer is involved in both the development and the maintenance of a stock index upon which a product such as Trust Shares is based. The proposal provides that, in such circumstances, the broker-dealer must have procedures in place to prevent the misuse of material, non-public information regarding changes and adjustments to the index and that the index value must be calculated by a third party who is not a broker-dealer. The Commission believes that these requirements should help to address concerns raised by a broker-dealer's involvement in the management of such an index.

Finally, the Commission believes that the PHLX's rules will ensure that investors have information that will allow them to be apprised adequately of the terms, characteristics, and risks of trading Trust Shares. The PHLX will require members and member organizations to provide all purchasers of Trust Shares with a written description of the terms and characteristics of Trust Shares, to include this written description in sales materials provided to customers or the public, to include a specific statement relating to the availability of the description in other types of materials distributed to customers or the public, and to provide a copy of the prospectus when requested by a customer.³² A PHLX member or member organization carrying an omnibus account for a non-member broker-dealer must inform a non-member that the execution of an order to purchase a series of Trust Shares for such omnibus account will be deemed to constitute an agreement by the non-member to make the written description available to its customers.³³

The Commission also notes that upon the initial listing, or trading pursuant to UTP, of any Trust Shares under the generic standards, the PHLX will issue a circular to its members explaining the

²⁵ 15 U.S.C. 78f(b)(5).

²⁶ In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

²⁷ See Trust Shares Order, *supra* note 9.

²⁸ See Trust Shares Order, *supra* note 9.

²⁹ See 1998 Release, *supra* note 6.

³⁰ See Amendment No. 2, *supra* note 4.

³¹ See Amendment No. 3, *supra* note 5.

³² See PHLX Rule 803(i)(3).

³³ See PHLX Rule 803(i)(3).

unique characteristics and risks of this type of security.³⁴ The circular also will note the PHLX members' prospectus or product description delivery requirements, and highlight the characteristics of purchases in a particular series of Trust Shares.³⁵ The circular also will inform members of their responsibility under PHLX Rules 746 and 747 in connection with customer transactions in Trust Shares.³⁶ The Commission believes that these requirements will help to ensure adequate disclosure to investors about the terms and characteristics of a particular series of Trust Shares.

The Commission finds good cause for approving the proposed rule change and Amendment Nos. 1, 2, and 3 prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission notes that the proposed rule change is based on the generic listing standards in Amex Rule 1000 *et seq.*, which the Commission approved after soliciting public comment pursuant to Section 19(b)(1) of the Act.³⁷ The Commission does not believe that the PHLX's proposal raises novel regulatory issues that were not addressed previously. Accordingly, the Commission believes it is appropriate to permit investors to benefit from the flexibility afforded by these new instruments by trading them as soon as possible. Amendment No. 1 strengthens the PHLX's proposal by indicating that the PHLX will file a proposed rule change pursuant to rule 19b-4 if the PHLX proposes to list and trade a series of Trust Shares that do not satisfy the proposed generic criteria. Amendment No. 2 strengthens the PHLX's proposal by clarifying, among other things, that the PHLX will distribute an information circular to members for each series of Trust Shares describing the characteristics and risks of Trust Shares and by indicating that Trust Shares will be subject to PHLX rules governing the trading of equity securities, including, among others, rules and procedures governing trading halts, responsibilities of specialists, account opening requirements, and margin. Amendment No. 3 clarifies the text of PHLX Rule 803(i)(11) and indicates that the PHLX will use its existing surveillance procedures for Trust Shares to monitor trading in Trust Shares traded pursuant to Rule 19b-4(e). Accordingly, the Commission

believes that there is good cause, consistent with Sections 6(b)(5) and 19(b)(2) of the Act,³⁸ to approve the proposal and Amendment Nos. 1, 2, and 3 to the proposal on an accelerated basis.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-PHLX-00-68), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.³⁹

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45185; File No. SR-Phlx-2001-113]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Increasing the Equity Option Transaction Charge for Broker-Dealer

December 21, 2001.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and rule 19b-4 thereunder,² notice is hereby given that on December 18, 2001, 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. 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 Exchange proposed to amend its schedule of dues, fees, and charges to increase its equity option transaction charge on members for off-floor broker-dealer orders³ routed to the Exchange

from \$0.20 to \$0.25. The Exchange intends to implement this fee on transactions settling on or after January 2, 2002.⁴

The text of the proposed rule change is available at the Office of the Secretary, the Phlx, and at the Commission.

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

Currently, the Exchange imposes a fee on its members for off-floor broker-dealer orders routed to the Exchange. This category includes ROTs that trade from off-floor and broker-dealers that route orders through firm, customer, or market maker accounts carried by a member clearing firm. This category does not include firm/proprietary orders.⁵ The Exchange states that all other equity option transaction charges will remain unchanged.

The Exchange states that the purpose of the proposed rule change is to generate additional revenue by increasing the fee imposed on members for off-floor broker-dealer orders routed to the Exchange. Thus, the broker-dealer

dealer. This includes orders for the account of a Registered Options Trader ("ROT") entered from off-floor. See Securities Exchange Act Release No. 43558 (November 14, 2000), 65 FR 69984 (November 21, 2000) (SR-Phlx-00-85).

⁴ The Exchange states that this fee will continue to be eligible for the monthly credit of up to \$1,000 to be applied against certain fees, dues and charges and other amounts owed to the Exchange by certain members. See Securities Exchange Act Release No. 44292 (May 11, 2001), 66 FR 27715 (May 18, 2001) (SR-Phlx-2001-49).

⁵ According to the Exchange, a firm/proprietary transaction or comparison charge applies to members for orders for the proprietary account of any member or non-member broker-dealer that derives more than 35 percent of its annual, gross revenues from commissions and principal transactions with customers. See Securities Exchange Release No. 43558 (November 14, 2000), 65 FR 69984 (November 21, 2000) (SR-Phlx-00-85).

³⁴ See Amendment Nos. 2 and 3, *supra* notes 4 and 5.

³⁵ See Amendment Nos. 2 and 3, *supra* notes 4 and 5.

³⁶ See Amendment Nos. 2 and 3, *supra* notes 4 and 5.

³⁷ See Amex Order, *supra* notes 24.

³⁸ 15 U.S.C. 78f(b)(5) and 78s(b)(2).

³⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ For purposes of the equity option transaction charge, the Exchange defines the term "broker-dealer charge" as a charge that is applied to members for orders, entered from other than the floor of the Exchange, for any account (i) in which the holder of beneficial interest is a member or non-member broker-dealer or (ii) in which the holder of beneficial interest is a person associated with or employed by a member or non-member broker-