

the hours of Phlx's Primary Trading Session will automatically change whenever the hours of a primary market change, thereby alleviating the need for additional rule changes. Accordingly, the Commission concludes that Phlx's proposal is reasonable and consistent with the Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁷ that the proposed rule change (SR-Phlx-01-21) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority:⁸

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44220; File No. SR-Phlx-2001-45]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Amending Rule 930

April 25, 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 April 20, 2001, 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 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 Rule 19b-4 of the Act, proposes to amend Exchange Rule 930, *Lease Agreement*, to add new paragraph (k). Proposed Rule 930(k) relates to the Exchange's ability to allow a member who leases a membership ("lessee") to pay past-due fees owed to the Exchange by the lessor under a lease agreement, on behalf of the lessor. The Exchange also proposes to amend Rule 930 to make certain minor technical amendments to the text of the rule in

order to make the various paragraphs contained in the rule more consistent.

Proposed Rule 930(k) states that the Exchange is a third party beneficiary of the lease agreement, and shall have the right to permit payment by a lessee of past-due fees owed to the Exchange by the lessor. The proposed rule further states that should the lessee pay such past due amounts, the lessee shall provide written notice to the lessor and the Exchange. Once the lessee has elected to make such payments, the lessee may continue to make such payments for a period of up to three months and set off such amounts, with notice to the Exchange and lessor against amounts due the lessor by the lessee. Furthermore, proposed Rule 930(k) states that notwithstanding the terms of the lease agreement, a lessee will not be considered in default of the lease agreement solely by virtue of having elected to make such payments.

In addition, certain minor technical amendments will be made to Rule 930 in order to make the text more consistent. For example, the word "agreement" will be added after the word "lease" in order to make it consistent with other references to "lease agreements." Also, the words "Certificate of Incorporation" are added to make the text more consistent and to clarify that various terms of a lease agreement must be in accordance with the Exchange's Certificate of Incorporation, as well as its by-laws and rules.

A. Discussion

1. Authority Under Delaware Law

The Exchange represents that, as a non-stock corporation organized under the Delaware General Corporation law ("DGCL"), it has the authority to adopt proposed Rule 930(k). Article Nineteenth of the Exchange's Certificate of Incorporation expressly empowers the Board of Governors ("Board") of the Exchange:

to determine whether, and under what terms and conditions, memberships may be leased, and to adopt by resolution or to set forth in the Rules of the Board of Governors such rules with respect to lease agreements, lessors and lessees as the board may from time to time determine to be advisable, including, without limitation, rules regulating and setting forth the rights and obligations of lessors and lessees, the required terms of lease agreements, and the fees, dues and other charges required to be paid by lessors and lessees (or either of them) to the Corporation in connection with and for the privilege of leasing memberships.³

Thus, the Exchange represents that Rule 930(k) clearly falls within Article Nineteenth's grant of authority.

In addition, Section 141(j) of the DGCL empowers the Board to direct the business and affairs of the Exchange, and the Exchange's by-laws give the Board broad power to adopt rules of the Exchange. 8 Del. C. § 141(j);⁴ By-Law Art. IV, § 4-4.

The Exchange represents that numerous provisions of its by-laws and rules already address matters similar to those addressed by proposed Rule 930(k).⁵ Moreover, the Exchange's by-laws require lessors and lessees (as members) to pledge to abide by the rules as they may be amended from time time.⁶

Accordingly, the Exchange states that the Board has the authority to adopt Rule 930(k) under the DGCL and the Exchange's Certificate of Incorporation, by-laws and rules.

2. Permissibility Under Pennsylvania Contract Law

The Exchange believes that proposed Rule 930(k) is also permissible as a matter of Pennsylvania contract law. The terms of the Exchange's contractual relationships with both lessors and lessees permit adoption of the rule, and, in any event, the Exchange is already a

2001) (approving adoption of Article Nineteenth, SR-Phlx-99-50).

⁴ See also 8 Del. C. § 121(a) (providing that in addition to powers expressly granted by law or the Certificate of Incorporation, the corporation and its directors may exercise "any powers incidental thereto, so far as such powers and privileges are necessary or convenient to the conduct, promotion or attainment of the business or purposes set forth in its certificate of incorporation"); Certificate of Incorporation, Article Third (stating, in part, that the Exchange may operate in any lawful act or activity for which corporations may be organized under the DGCL).

⁵ See, e.g., By-Law Art. XV, § 15-1(a) (providing that a membership may be leased in accordance with such rules as the Board may adopt); By-Law Art. XII, § 12-8 (authorizing lessor application fee as fixed from time to time by the Board, lessor initiation fee and fee upon transfer of equitable title to a membership); Rule 930 (setting forth required terms of lease agreement and providing, among other things, that the Exchange may dispose of a membership subject to a lease agreement); Rule 960.1 (providing that all members, member organizations and any persons associated with any member are subject to expulsion, suspension, termination as to activities at the Exchange or any other fitting sanction for violation of the Rules of the Exchange); see also Certificate of Incorporation, Article Twentieth (giving Board plenary authority to assess fees, dues and other charges and to impose penalties, including cancellation of a membership and forfeiture of all rights as a lessor or lessee, for nonpayment).

⁶ See Exchange By-Law Art. XII, § 12-9. As a condition of the right to lease their seats, lessors agree "to abide by the [Exchange's] By-laws as they have or shall be from time to time amended, and by all rules and regulations adopted pursuant to the By-Laws." Lessees, as members, likewise make the same commitment.

⁷ 15 U.S.C. 78s(b)(2).

⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 43987 (February 20, 2001), 66 FR 12582 (February 27,

third party beneficiary to the lease agreements as a matter of law. Each of these reasons separately provides a sufficient legal basis under Pennsylvania contract law for the adoption of Rule 930(k). (Future lease agreements would of course be deemed to incorporate the terms of Rule 930(k) within them, and thus obviate any contract law question).

a. Lease Terms Incorporate Relevant Terms of the Exchange's Certificate of Incorporation, By-Laws and Rules

Under the terms and conditions pursuant to which the Exchange awards the privileges of membership and approves the right to lease a seat, the Exchange reserves the right to adopt authorized by-laws, rules, or regulations that affect those lessors and lessees; accordingly, the Exchange represents that any potential impact on lease agreements of Rule 930(k) would be contractually permissible. Both lessors and lessees (as members) agree respectively as a condition of approval of the right to lease seats and as a condition of approval for membership that the Exchange may effectuate changes to their lease agreements. As a condition of the right to lease their seats, lessors agree "to abide by the [Exchange's] By-Laws as they have or shall be from time-to-time amended, and by all rules and regulations adopted pursuant to the By-Laws."⁷ Lessees (as members) likewise make the same commitment.⁸ By agreeing to abide by future by-laws, rules, and regulations, lessors and lessors and lessees necessarily grant permission to the Exchange to adopt rules pursuant to which their lease agreements may be affected.

Accordingly, the Exchange represents that Rule 930(k), which would provide in express form the authorization for the modification of lease agreements, would simply authorize that which is countenanced by the terms of the Exchange's existing relationships with lessors and lessees. It is thereby permissible as a matter of Pennsylvania contract law.

b. The Exchange Is a Third-Party Beneficiary of All Lease Agreements

The Exchange is already, as a matter of Pennsylvania law, a third party beneficiary of lease agreements and would as such be entitled to collect Exchange fees from a lessee upon the default of a lessor, and to permit set-off by the lessee. Pennsylvania law provides that as a third-party

beneficiary the Exchange is entitled to enforce, in its own name, as a real party in interest, the rights that accrue to it under the lease agreement. Generally, a non-party to a contract is a third party beneficiary either (i) when the parties to a contract express an intention in the contract itself to benefit the third party, or (ii) if the surrounding circumstances are sufficiently compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the parties to pay money to the beneficiary or the circumstances indicate that the parties intend to give the beneficiary the benefit of the promised performance.

Here, the Exchange represents that it is a third party beneficiary of lease agreements in accordance with the intention expressed in the lease agreements themselves even in the absence of Rule 930(k). Rule 930(c) provides that the lease agreement "shall require a lessee to pay the Corporation [the Exchange] * * * all applicable dues, fees, charges, and other debts arising from the use of membership." As the purpose of the lease agreement is to permit the lessee the "use of membership," proposed Rule 930(k) specifies the circumstances in which the Exchange, rather than *requiring* payment by the lessee of one such fee, is simply *allowing* payment by a lessee.

In addition, the Exchange believes that many of the other terms of the lease agreements also manifest the parties' clear intent to make the Exchange a beneficiary. *See* for example, Rule 930(a) (the Exchange must approve the transfer of membership); 930(d) (the lessee may not encumber legal title to the membership during the lease agreement); 930(e) (legal title to the membership must be transferred to the lessor in accordance with the Exchange's by-laws upon the expiration of the lease agreement or other such event); and 930(j) (the Exchange may dispose of a membership subject to a lease agreement in accordance with its by-laws and rules).

Moreover, in addition to the intent manifested in the lease agreements, which is itself sufficient to render the Exchange a third party beneficiary, the Exchange represents and the circumstances surrounding the lease agreements independently compel the same conclusion. As noted, the lease agreements are required to contain mandatory provisions that make reference to the Exchange, *see* Rule 930. Reference to a third party in the contract itself is a strong indication that the party is a third party beneficiary. The Exchange also exercises numerous

rights related to the lease agreements. It approves lessors, as well as lessors, Rule 931 (approval of lessors); By-Law Art. XV, § 51-1 (approval of lessees), and requires lessors and lessees to abide by the Exchange's by-laws, By-Law Art. XII, § 12-9(a), (b); Rule 930(j). Indeed, the purpose of the lease agreement is to permit trade on the Exchange.⁹ The Exchange also reserves the right to approve all transfers of membership pursuant to a lease agreement.¹⁰ Finally, as noted, Rule 930 already requires that lessees be responsible for payment to the Exchange of all applicable dues, fees, charges and other debts, and proposed Rule 930(k) identifies under what circumstances the lessee may, at his or her option, remit one such fee to the Exchange.¹¹

Accordingly, the Exchange represents that it is a third party beneficiary to the lease agreements with the right to enforce the provisions of Rule 930(k).

In sum, the Exchange states that adoption by the Exchange of proposed Rule 930(k) would be consistent with applicable corporate governance and contract law.

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 maybe 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.

⁹ *See* By-Law Art. XII, § 21-1 (a member conducts business on the Exchange).

¹⁰ *See* Rule 930(a), (d) and (e).

¹¹ Indeed, the Exchange may well be a constructive party to the lease agreement. While Pennsylvania courts have not had the opportunity to address the issue of constructive parties, there exists persuasive caselaw elsewhere that when the contracting parties, and a third party have a sufficiently intertwined business relationship, the third party is deemed to be constructive party to the contract. Here, for the various reasons outlined in the text, the Exchange, lessors, and lessees, possess such an extraordinarily intertwined business relationship that the Exchange could be considered a constructive party to lease agreements. This would provide yet another alternate basis for the legal adequacy of the Exchange's proposed Rule 930(k).

⁷ *See* By-Law Art. XII, § 12-9(b).

⁸ *See id.* at 12-9(a).

II. 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 amend Exchange Rule 930 to add paragraph (k), which allows the lessee of membership to pay fees owed to the Exchange by the lessor that are past due and to set off such amounts from amounts due the lessor by the lessee.¹² This provision, which the Phlx represents is in accordance with proposed Exchange Rule 51,¹³ allows a lessee to pay, on behalf of the lessor, any fees, including the capital funding fee,¹⁴ owed to the Exchange by the lessor. Proposed Rule 930(k) helps to protect innocent lessees from being unexpectedly dispossessed from their membership and trading rights in the event of nonpayment by their lessors. Pursuant to proposed Rule 930(k), the lessee should be able to continue trading under his/her current lease provisions, for a period of up to three months. Therefore, the lessee's trading privileges should not be interrupted if the lessor does not pay its fees, including the capital funding fee referred to in footnotes 12, 13 and 14. In addition, the provisions of proposed Rule 930(k) should give the lessee sufficient time to execute a new lease agreement, if necessary.¹⁵ The Exchange believes that provisions (contained in its Certificate of Incorporation and by-laws) give the Exchange the authority to

modify lease agreements in the manner described above.¹⁶

The Phlx further represents that the purpose of the minor technical amendments to Rule 930 is to make the language in the paragraphs of the existing rule more consistent with each other. References to the Certificate of Incorporation are being added throughout Rule 930. For example, paragraph (a) of Rule 930 would state that a lease agreement shall not be effective unless the transfer of membership was approved under the Exchange's Certificate of Incorporation, by-laws or rules. The Exchange represents that, as a matter of Delaware corporation law, a certificate of incorporation is preeminent and accordingly, by-laws and any rules adopted thereto cannot conflict with the certificate of incorporation.¹⁷ Further, the Exchange is amending Rule 930 to consistently refer to the lease as a "lease agreement."

2. Statutory Basis

For these reasons, the Exchange believes that the proposed rule change is consistent with Section 6 of the Act,¹⁸ in general, and with Section 6(b)(5),¹⁹ in particular, in that it is designed to promote just and equitable principles of trade and protects investors and the public interest by enabling lessees to continue trading, even with their respective lessors fail to pay fees owed the Exchange when due.

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

Written comments were neither solicited nor received on the proposed rule change.

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 Phlx consents, the Commission will:

A. By order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

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. 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 No. SR-Phlx-2001-45 and should be submitted by May 23, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁰

Margaret H. McFarland,
Deputy Secretary.

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DEPARTMENT OF STATE

Office of Defense Trade Controls

[Public Notice 3650]

Notifications to the Congress of Proposed Commercial Export Licenses

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Department of State has forwarded the attached Notifications of Proposed Export Licenses to the Congress on the dates shown on the attachments pursuant to section 36(c) and 36(d) and in compliance with section 36(e) of the

¹² The principal fee that the Phlx currently charges to lessors and other owners of memberships in the "capital funding fee." See Securities Exchange Act Release No. 42993 (June 29, 2000), 65 FR 42415 (July 10, 2000) (approving adoption of capital funding fee, SR-Phlx-99-51). See footnote 14 below for a further discussion of the capital funding fee.

¹³ On December 6, 1999, the Exchange submitted a proposed rule change relating to the adoption of new Rule 51, *Enforcement*, which relates to the ability of the Exchange's Board to take certain specified measures if any owner of a membership fails to pay (or have paid on its behalf) any capital funding fee when due. The proposal is ending (SR-Phlx-99-52).

¹⁴ On January 5, 2000, the Commission approved as a three-month pilot program, a capital funding fee applicable to owners of memberships. See Securities Exchange Act Release No. 42318 (January 5, 2000), 65 FR 2216 (January 13, 2000) (SR-Phlx-99-49). On April 24, 2000, the Commission approved the extension of the three-month pilot program until July 6, 2000. See Securities Exchange Act Release No. 42714 (April 24, 2000), 65 FR 25782 (May 3, 2000) (SR-Phlx-00-29). Permanent approval of the capital funding fee was received on June 29, 2000. See Securities Exchange Act Release No. 42993 (June 29, 2000), 65 FR 42415 (July 10, 2000) (SR-Phlx-99-51).

¹⁵ Under proposed Rule 51, *supra* note 13, the Exchange may issue temporary trading rights to members whose leases are suspended due to nonpayment of the capital funding fee by the lessor.

¹⁶ See Certificate of Incorporation Article Third, proposed Article Nineteenth and Article Twentieth, By-Law Art. XII, § 12-9, and proposed Rule 51.

¹⁷ See 8 Del. C. § 102 and 109(b)

¹⁸ 15 U.S.C. 78f(b).

¹⁹ 15 U.S.C. 78f(b)(5).

¹⁷ 17 CFR 200.30-3(a)(12).