

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Commission recently approved amendments to Rules 134, 407A, and 411 relating to members' error accounts and error account procedures. The Exchange had intended to implement these changes on January 7, 2002.<sup>3</sup> However, feedback from several members and member organizations indicated that they will need additional time to implement procedures, including automatic surveillance procedures, to fully comply with the provisions of Rules 134, 407A, and 411. Therefore, the Exchange proposes to change the implementation date from January 7, 2002 to February 4, 2002.

2. Statutory Basis

The NYSE states that the basis for the proposed rule change is the requirement under section 6(b)(5) of the Act<sup>4</sup> that an exchange have rules that are designated 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.

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

The NYSE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

The NYSE has designated the proposed rule change as constituting a stated policy, practice or interpretation with respect to the meaning, administration, or enforcement of the NYSE rules to which it relates,<sup>5</sup> which renders the proposal effective upon

filing with the Commission pursuant to section 19(b)(3)(A) of the Act<sup>6</sup> and Rule 19b-4(f)(3) thereunder.<sup>7</sup>

At any time within 60 days of the filing of such 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.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether it 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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office at the NYSE. All submissions should refer to File No. SR-NYSE-2002-04, and should be submitted by February 8, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-45254; File Nos. SR-Phlx-00-02 and SR-Phlx-00-03]

**Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Changes by the Philadelphia Stock Exchange, Inc. Relating to Equity Trading Permits and Notice and Order Granting Accelerated Approval to Amendments No. 3 Thereto**

January 9, 2002.

**I. Introduction**

On January 12, 2000, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), 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> a proposed rule change to amend its Certificate of Incorporation to add a new article authorizing the Board of Governors to issue Equity Trading Permits ("ETPs").<sup>3</sup> The Exchange filed amendments to the proposed rule change on May 30, 2000<sup>4</sup> and July 12, 2000.<sup>5</sup> The proposed rule change was published for comment in the **Federal Register** on September 1, 2000.<sup>6</sup> On December 17, 2001, the Exchange filed Amendment No. 3 to the proposal.<sup>7</sup>

Also on January 12, 2000, the Exchange submitted to the Commission, pursuant to Section 19(b)(1) of the Act<sup>8</sup> and Rule 19b-4 thereunder,<sup>9</sup> a proposed

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

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

<sup>3</sup> SR-Phlx-00-02.

<sup>4</sup> See Letter from Carla Behnfeldt, Counsel, Phlx, to Sonia Patton, Staff Attorney, Division of Market Regulation ("Division"), Commission, dated May 25, 2000.

<sup>5</sup> See Letter from Carla Behnfeldt, Counsel, Phlx, to Sonia Patton, Staff Attorney, Division, Commission, dated July 11, 2000.

<sup>6</sup> See Securities Exchange Act Release No. 43211 (August 25, 2000), 65 FR 53251.

<sup>7</sup> See Letter from Mark I. Salvacion, Director and Counsel, Phlx, to Belinda Blaine, Associate Director, Division, Commission, dated December 14, 2001 ("Amendment No. 3 to SR-Phlx-00-02"). In Amendment No. 3, the Exchange amended the Certificate of Incorporation to: (1) Provide that permit holders may serve on, or nominate candidates for the Board of Governors or Committees; and (2) clarify that permit holders are not members of the Exchange for purposes of Delaware General Corporate Law ("DGCL") and shall have no rights or privileges conferred upon members of a nonstock corporation solely by DGCL. In Amendment No. 3, the Exchange also represented that the Board of Governors will appoint a qualified ETP holder, or associated person thereof, to the Exchange's Business Conduct Committee at the next annual appointment of Business Conduct Committee members, presently scheduled for March 2002. Lastly, the Exchange stated that it has authorized the Board of Governors to issue only 75 permits.

<sup>8</sup> 15 U.S.C. 78s(b)(1).

<sup>9</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 44769 (September 6, 2001), 66 FR 44710 (September 13, 2001) (approval order concerning File No. SR-NYSE-99-25).

<sup>4</sup> 15 U.S.C. 78f(b)(5).

<sup>5</sup> See letter from Darla C. Stuckey, NYSE, to Katherine A. England, assistant director, Division of Market Regulation, Commission, dated January 9, 2002.

<sup>6</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>7</sup> 17 CFR 240.19b-4(f)(3).

<sup>8</sup> 17 CFR 200.30-3(a)(12).

rule change to adopt a rule setting forth the terms and conditions of ownership of ETPs.<sup>10</sup> The Exchange filed amendments to the proposed rule change on May 30, 2000<sup>11</sup> and July 12, 2000.<sup>12</sup> The proposed rule change was published for comment in the **Federal Register** on September 1, 2000.<sup>13</sup> On December 17, 2001, the Exchange filed Amendment No. 3 to the proposal.<sup>14</sup>

The Commission received two comment letters regarding the proposals.<sup>15</sup> This notice and order approves both proposed rule changes, as amended, and solicits comments from interested persons on Amendment No. 3 to each proposed rule change.

## II. Description of the Proposal

### A. SR-Phlx-00-02

The Exchange proposes to amend its Certificate of Incorporation by adding a new Article Twenty-First ("Article Twenty-First") that authorizes the Exchange's Board of Governors

("Board") to issue trading permits that would allow the holders of such permits to conduct business on the Exchange. Article Twenty-First also authorizes the Board to adopt rules governing, among other things, the terms, conditions, number, and transferability of permits, the qualifications that members and non-members must meet to be issued a permit, and the dues and other charges to be paid to the Exchange in connection with the permits.<sup>16</sup>

Article Twenty-First permits the Board to authorize the Chairman of the Board or any Board committee to exercise any powers of the Board with respect to the permits. Article Twenty-First also provides that permit holders shall be eligible to serve on, or nominate candidates for election to, the Board or Committees thereof or other Exchange Committees referred to in the By-Law or Rules of the Exchange.<sup>17</sup>

Article Twenty-First is intended to give the Board the flexibility to create a means, other than the purchase or lease of an Exchange membership, for qualified persons to acquire trading rights on the Exchange. The Exchange's Certificate of Incorporation provides that the purpose of the Exchange is to "act as and to provide a securities exchange where the [Exchange's] members and other persons authorized by it can [do business]."<sup>18</sup> In Article Twenty-First, the Exchange makes clear that such "other persons" authorized to do business at the Exchange includes holders of trading permits authorized by the Board.

### B. Phlx-00-03

Phlx Rule 23 will govern the terms and conditions of ETPs, which are intended to confer access privileges to the Exchange's equity trading floor.<sup>19</sup>

Phlx Rule 23 establishes two classes of ETPs. Regular Equity Trading Permits ("Regular ETPs") authorize their holders to trade equity securities on any facility of the Exchange, in any capacity permitted to members, including as a specialist. Off-Floor Equity Trading Permits ("Off-Floor ETPs") allow holders electronic and telephonic access, but not physical access, to the Exchange floor.

Phlx Rule 23(a) provides that the two classes of ETPs may be issued by the Exchange to applicants pursuant to resolution of the Board of Governors ("Board") for such fee as may be established from time to time by the Board. The Exchange may issue a maximum of 75 ETPs.<sup>20</sup>

Phlx Rule 23(b) requires ETP applications to be approved by the Exchange. The application process for applicants who are not members of the Exchange would also include an admissions determination by the Exchange's Admissions Committee. ETP applicants who are members of the Exchange when they apply for an ETP would have already received a favorable admissions determination by the Exchange's Admissions Committee. With respect to ETP applicants who are not Exchange members, the admissions process would be the same as that currently required in connection with membership applicants, and the decision to grant or deny an application for admission as an ETP holder would be made by the Admissions Committee under its established procedures.<sup>21</sup> Phlx Rule 23(b) also requires the applicant to sign a pledge to abide by the By-Laws and rules of the Exchange and to submit to the Exchange's disciplinary jurisdiction.

Phlx Rule 23(c) provides that, except as may be otherwise set forth in the Rule or in other rules of the Exchange or effective Commission filings, an ETP holder will have the right to transact business on the floor of the Exchange to the same extent and in the same manner, and would be deemed to have the same rights and obligations, as a member of the Exchange without options privileges.<sup>22</sup> It also establishes

which SCCP may treat ETP holders as Phlx members for purposes of clearing services it provides. See Securities Exchange Act Release No. 45255 (January 9, 2002) (SR-SCCP-00-01).

<sup>20</sup> See Amendment No. 3 to SR-Phlx-00-03, *supra* note 14.

<sup>21</sup> Phlx Rule 901, Denial of and Conditions to Membership, sets forth certain criteria for membership decisions which would also apply to any determination to issue an ETP to an applicant who is not already a Phlx member.

<sup>22</sup> The Commission has in the past approved the Exchange's issuance of Foreign Currency Options

Continued

<sup>10</sup> SR-Phlx-00-03.

<sup>11</sup> See Letter from Carla Behnfeldt, Counsel, Phlx, to Sonia Patton, Staff Attorney, Division, Commission, dated May 25, 2000.

<sup>12</sup> See Letter from Carla Behnfeldt, Counsel, Phlx, to Sonia Patton, Staff Attorney, Division, Commission, dated July 11, 2000.

<sup>13</sup> See Securities Exchange Act Release No. 43212 (August 25, 2000), 65 FR 53253.

<sup>14</sup> See Letter from Mark I. Salvacion, Director and Counsel, Phlx, to Belinda Blaine, Associate Director, Division, Commission, dated December 14, 2001 ("Amendment No. 3 to SR-Phlx-00-03"). In Amendment No. 3, the Exchange: (1) Amended proposed Rule 23(a) to specify that it will issue a maximum of 75 ETPs; (2) deleted a provision in proposed Rule 23(b) which would have required that ETP holders be at least the minimum age of majority as it was inconsistent with a By-Law requirement that the those applying for exchange membership by twenty-one years of age; (3) expanded the language of proposed Rule 23(c) to clarify that ETP holders are deemed to be members for purposes of eligibility requirements to serve on the Board of Governors or Exchange Committees and for the purpose of nominating candidates for the Board; (4) amended proposed Rule 23(c) to clarify that permits issued by the Exchange are not "Regular" or "Convertible" memberships of the Exchange, and are not members for purposes of DGCL and shall have no rights or privileges conferred on members of a nonstick corporation solely by DGCL; (5) amended proposed Rule 23(e) to clarify that ETP holders shall be subject certain Exchange fees and charges, but not to annual membership dues, technology fees or capital assessments; and (6) amended proposed Rule 239(i) to clarify that ETP organizations will be required to post security with the Exchange, the proceeds of which may be applied by the Exchange upon termination of any ETP in the same manner as proceeds of membership transfers under Exchange By-Law 15-3.

<sup>15</sup> See letters from Matthew D. Wayne, Vanasco, Wayne & Genelly, to Jonathan G. Katz, Secretary, Commission, dated February 25, 2000 ("Wayne Letter"), and William W. Uchimoto, Executive Vice President and General Counsel, Ashton Technology, to Jonathan G. Katz, Secretary, Commission, dated September 5, 2000 ("Ashton Letter"). These letters were sent in response to both proposed rules changes.

<sup>16</sup> The Commission notes and the Exchange has acknowledged that any such action undertaken pursuant to Board resolution and not proposed to be set forth in the rules of the Exchange would nonetheless be filed with the Commission to the extent required pursuant to Section 19(b) of the Act and Commission rules thereunder.

<sup>17</sup> See Amendment No. 3 to SR-Phlx-00-03, *supra* note 6.

<sup>18</sup> Phlx Certificate of Incorporation, Article Third (emphasis added). The Exchange notes that the Commission has previously approved the issuance by the Exchange of foreign currency options participations ("FCO Participations") pursuant to which both Exchange members and non-members may trade foreign currency options on the Exchange. See Securities Exchange Act Release No. 19134 (October 14, 1982), 47 FR 46949 (October 21, 1982).

<sup>19</sup> The Exchange has a proposal pending with the Commission to amend its schedule of dues, fees, and charges to provide that the Exchange's existing application fee and initiation fee apply to ETPs, and to impose monthly ETP fees. See SR-Phlx-00-04. Finally, Stock Clearing Corporation of Philadelphia ("SCCP") has proposed a change to its certificate of incorporation and to SCCP Rule 3 pursuant to

that an ETP holder will not be entitled by virtue of the ETP to vote in any election or on any amendment to the By-Laws or on any other matter, or to petition or to be counted as part of a quorum at meetings of members. ETP holders will, however, be eligible to serve on, and nominate candidates for, the Board of Governors and Exchange committees if elected or appointed and subject to existing qualification requirements for service, to the same extent as members.<sup>23</sup> Because an ETP confers no equity interest in Exchange assets or property, Phlx Rule 23(c) establishes clearly that an ETP will not entitle its holder to share in any distribution of the assets or funds of the Exchange in the event of any voluntary or involuntary liquidation, dissolution, or winding up of the affairs of the Exchange, or to purchase options privileges. Finally, Phlx Rule 23(c) provides that specialist members who elect to sell or lease their memberships in favor of Regular ETPs would continue to be specialists in their allocated securities.

Phlx Rule 23(d) establishes the rights of holders of Off-Floor ETPs. An Off-Floor ETP holder will be able, if accompanied by a regular member, to visit the floor of the Exchange, but will not have the privilege of transacting business on it. Consequently, an Off-Floor ETP holder will not be eligible to apply for specialist privileges. With this exception, an Off-Floor ETP holder will have the same rights as a Regular ETP holder. In particular, an Off-Floor ETP holder will be authorized, for the purpose of trading equity securities, to maintain electronic or telephonic access to (i) the floor facilities on the equities floor of the Exchange of a member or member organization or a Regular ETP holder, (ii) the Philadelphia Stock Exchange Automated Communication and Execution System ("PACE"),<sup>24</sup> and

Participations ("FCO Participations"). Like holders of FCO Participations, ETP holders would generally be subject to Phlx's rules and By-Laws but would not be entitled to all the rights and privileges granted to Phlx members. See Securities Exchange Act Release No. 19134 (Oct. 14, 1982), 47 FR 46949 (Oct. 21, 1982).

<sup>23</sup> ETP holders will be deemed to be "members" and ETP organizations will be deemed to be "member organizations" for the purpose of eligibility to serve on the Board or Exchange Committees, and nominate candidates for the Board. However, ETP holders shall only have such rights, privileges, and obligations as are expressly set forth in the Certificate of Incorporation, Rule 23, or resolutions of the Board. References in Exchange Rules, By-Laws or the Certificate of Incorporation to "members" shall include ETP holders. See Amendment No. 3 to SR-Phlx-00-03, *supra* note 14.

<sup>24</sup> PACE is the Exchange's automatic order routing and execution system on the equity trading floor. PACE accepts orders for manual and automatic

(iii) such other automated trading systems of the Exchange as may be made available to members of the Exchange without options privileges.

Phlx Rule 23(e) establishes the ability of the Exchange to impose fees and charges on ETP holders. An ETP holder will be subject to the same obligations and duties (including the payment of Exchange fees and charges) imposed on Exchange members, except that ETP holders will not be charged annual membership dues, technology fees, or any capital assessments that could be imposed in the future.<sup>25</sup> Phlx Rule 23(e) establishes that all provisions of the Exchange's Certificate of Incorporation and By-Laws, and the rules, regulations, requirements, orders, directions and decisions adopted pursuant to them which by their terms are applicable to Exchange members will also apply to ETP holders unless their application is inconsistent with the provisions of Rule 23. Likewise, all references in such documents to "non-members" will not be construed to apply to ETP holders. Consistent with Phlx Rule 23(e), the Exchange intends to charge a \$200 application fee for every ETP application made by members and non-members. Non-member applicants for ETPs will also be required to complete the same admissions process required by the Exchange for membership applicants, and will be charged the \$1,500 initiation fee upon issuance of the ETP just as members are charged this fee upon election to membership. After an ETP is issued, its holder will be subject to the same fees as Phlx members (except as otherwise noted in Phlx Rule 23(e)) in addition to a monthly ETP fee.

Phlx Rule 23(f) makes clear that, unlike a membership, an ETP may not be transferred by lease, sale, gift, involuntary transfer, or any other means or as collateral to secure any obligation, except that an ETP may be transferred within the holder's ETP organization to (i) an individual who has applied for and been approved by the Admissions Committee as an ETP holder, or (ii) an "inactive nominee" registered as such with the Exchange.

Phlx Rule 23(g) provides that an individual ETP holder associated with a broker-dealer will be required to qualify

execution in accordance with the provisions of Rule 229, which governs the PACE System and defines its objectives and parameters.

<sup>25</sup> In particular, they will not be subject by virtue of the ETP to the Exchange's \$1,500 capital funding fee. See Securities Exchange Act Release No. 42993 (June 29, 2000), 65 FR 42415 (July 10, 2000). Fees proposed to be assessed by the Exchange with respect to ETPs are described in SR-Phlx-00-04. See Amendment No. 3 to SR-Phlx-00-03, *supra* note 14.

such broker-dealer as an ETP firm or an ETP corporation just as a member would register it as a member firm or member corporation under current Exchange rules.<sup>26</sup> Except to the extent otherwise set forth in Phlx rule 23 or in other Exchange rules or effective Commission filings, an ETP organization will have the same rights and obligations as a member organization of the Exchange. The organization would cease to be an ETP organization of the Exchange upon termination of the ETP pursuant to which the ETP organization is qualified.

Phlx Rule 23(g) also requires every ETP applicant whose fees are to be paid by such ETP organization to file, along with his or her ETP application, an agreement between the ETP applicant and the ETP organization (an "ETP Use Agreement") providing that the ETP organization may direct the transfer of the ETP to another qualified individual within the ETP organization and that the ETP holder may not object to such transfer. The ETP Use Agreement is in some respects analogous to the A-B-C Agreement provided for in Exchange Rule 930 pursuant to which a member contributes the use of a membership to the membership organization. Like the A-B-C Agreement provided for in Rule 940, the ETP Use Agreement would restrict the use of the ETP by its holder in the event of the holder's termination of his association with the ETP organization.<sup>27</sup>

Phlx Rule 23(h) permits the Exchange to suspend or expel an individual ETP holder on the same basis as a member. It also permits the Exchange to amend the terms of, to discontinue offering or to terminate existing ETPs of one or more classes at any time upon thirty days written notice. Similarly, Phlx Rule 23(h) requires an ETP holder to provide the Exchange thirty days written notice prior to termination of the ETP. The Exchange is required to provide notice of an ETP's termination to the membership in the same manner it provides notice of a proposed transfer of a membership. The ETP holder will remain liable for all obligations incurred as an ETP holder until these obligations are discharged, and the Exchange is authorized to draw upon any security provided pursuant to Rule 23(i), discussed below, for the payment of such obligations at any time if they remain unpaid as of the date of termination.

<sup>26</sup> Like Exchange members, an ETP holder will be required to be associated with a registered broker-dealer.

<sup>27</sup> The A-B-C Agreement contains additional provisions arising from the division of equitable and legal title to membership, a concept which is inapplicable to ETPs.

Phlx Rule 23(i) requires ETP organizations to provide acceptable security for payment of any claims pursuant to By-Law 15-3 upon termination of an ETP. The proceeds of the posted security may be applied by the Exchange upon termination of any ETP in the same manner as proceeds of membership transfers under By-law 15-3.<sup>28</sup> The security requirement may be met, at the option of the ATP organization, by providing a letter of credit or other guaranty acceptable to the Exchange, or by depositing \$50,000 with the Exchange to be held in a segregated account with all other such deposits and held by the Exchange as security. The security required is the same for each ETP organization, regardless of the number of ETPs issued to its associated persons, and is unrelated to any security requirement established by SCCP.<sup>29</sup> The requirement does not apply to member organizations or ETP organizations that have been in good standing at the Exchange for the previous year. Consequently, ETP organizations in good standing for one year after providing such security will be entitled to its return, subject to any prior or appending claims. Finally, Phlx Rule 23(i) makes clear that at such time as no ETP holders remain associated with the ETP organization, the Exchange shall release any remaining security following payment of claims pursuant by By-Law 15-3 and upon execution by the ETP holder and ETP organization of releases satisfactory to the Board of Governors.

The Exchange expects to first undertake the ETP offering by distributing an informational circular and an ETP Application Form to be completed and returned to the Exchange together with payment of the Exchange's application fee. In addition to the ETP Application Form, applicants who are not Exchange members will be required to supply to the Admissions Committee all information required for that Committee to make an admissions determination under its established procedures, as discussed above.

### III. Summary of Comments

The Commission received two comment letters in response to the proposed rule changes.<sup>30</sup> One commenter expressed general support for the proposal, stating that it would place the Phlx "in a pro-competitive position with other exchanges that have reduced the cost of access to electronic

trading facilities."<sup>31</sup> The other commenter, however, challenged the Phlx's authority to authorize the Board to issue trading permits without a membership vote, and stated that the purpose of the proposal was to harm persons who lease seats to members wishing to trade on the Phlx Floor ("Lessors").<sup>32</sup>

The commenter argued that the Phlx Certificate of Incorporation contemplates a fixed number of membership seats, possession of which gives a person or entity access and trading rights to the Phlx trading floor. Issues relating to membership seats, including different classes of members, are governed by the Exchange's By-Laws, according to the commenter. The commenter goes on to argue that the proposed ETPs are "de facto membership seats," and thus should be governed by the By-Laws, a change to which requires a membership vote, not the Certificate of Incorporation. The commenter describes the addition of a new article to the Certificate of Incorporation to create the ETPs as an attempt by the Exchange to do an end-run around its By-Laws, and avoid a full membership vote on the proposal.<sup>33</sup>

The Exchange, however, believes that the Certificate of Incorporation already permits ETPs, and that an amendment of the Exchange's By-Laws is not required. Further, the Exchange believes that the proposed amendment to the Certificate of Incorporation authorizes ETPs in any event and supersedes any inconsistent provision in the By-Laws as a matter of basic corporate law.

The Wayne Letter also contends that the Exchange's proposal to create ETPs is part of "a methodical plan to destroy both Lessors and the value of PHLX membership seats." The commenter states that "[t]hrough the proposed trading permits, the PHLX is attempting to divert seat rental income from Lessors directly to the Exchange," and that it is the intention of the Board that if the proposal is approved, persons wishing to trade on the Exchange will purchase a permit rather than lease a seat. The commenter states that the Board owes a fiduciary duty to Lessors, which prohibits it from competing directly against Lessors in this manner.

The Exchange has considered this comment and stated that its business judgment the potential benefits to the

Exchange of the trading permits, including the potential for increased access and enhance competition on the trading floor and the opportunity to attract additional order flow and new business, justify any possible dilution of memberships and may, in the longer term, result in higher prices for regular memberships. The Exchange believes that ETPs are in the best interests of the Exchange and its membership as a whole (including both lessee members and lessor owners), and notes that the Exchange's stated purpose in Article Third of its Certificate of Incorporation is "[t]o act as and to provide a securities exchange where [its] members and other persons authorized by it" can deal in securities.

### IV. Discussion

After careful review, the Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>34</sup> In particular, the Commission finds that the proposed rule changes further the objectives of Sections 6(b)(2), 6(b)(3), and 6(b)(5).<sup>35</sup>

The Commission believes that the proposed rule changes are consistent with Section 6(b)(5) of the Act<sup>36</sup> and are not designed to permit unfair discrimination between customers, issuers, brokers or dealers. The Commission finds that ETPs may help facilitate transactions by allowing more broker-dealers direct access to the Phlx market and attracting greater order flow consistent with Section 6(b)(2) of the Act.<sup>37</sup>

In addition, the Commission finds that the proposed rule change is consistent with Section 6(b)(3) of the Act.<sup>38</sup> The Commission notes that the Exchange's Board can issue no more than 75 ETPs,<sup>39</sup> which is not significant in relation to the number of regular members on the Exchange.<sup>40</sup> The Commission also notes that the Phlx is a member-controlled exchange, which includes 52 members using a

<sup>34</sup> In approving this rule, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f). In addition, the Commission notes that its approval of this proposed rule change only extends to the applicable Exchange Act finding under Section 6(b). 15 U.S.C. 78f(b).

<sup>35</sup> 15 U.S.C. 78f(b)(2), (3) and (5).

<sup>36</sup> 15 U.S.C. 78f(b)(5).

<sup>37</sup> 15 U.S.C. 78f(b)(2).

<sup>38</sup> 15 U.S.C. 78f(b)(3).

<sup>39</sup> See Amendments No. 3 to SR-Phlx-00-02 and SR-Phlx-00-03, *supra* notes 7 and 14.

<sup>40</sup> There are 505 regular members of the Exchange. If the Phlx wanted to issue more than 75 ETPs, it would have to amend its Certificate of Incorporation and By-Laws to provide for fair representation of these ETPs.

<sup>28</sup> See Amendment No. 3 to SR-Phlx-00-03, *supra* note 14.

<sup>29</sup> See SCCP Rule 4.

<sup>30</sup> See *supra* note 7.

<sup>31</sup> See Ashton Letter.

<sup>32</sup> See Wayne Letter.

<sup>33</sup> The commenter contends that, "[t]he PHLX is well aware that if the full membership were presented with the issue of trading permits as a proposed amendment to the By-Laws, the membership would reject the proposal." See Wayne Letter.

membership on the equity floor, whose interests are represented on the Nominating and Election Commission and Business Conduct Commission, and that the Phlx has committed to appointing a qualified ETP holder, or associated person thereof, to the Exchange's Business Conduct Committee at the next annual appointment of Business Conduct Committee members.<sup>41</sup> Finally, the Commission notes that any disciplinary or trading rules affecting these members are subject to the rule filing process, which requires that proposed rules be submitted to the Commission for consideration and approval.

### V. Amendment No. 3

#### A. SR-Phlx-00-02

The Commission finds good cause for approving Amendment No. 3 to SR-Phlx-00-02 prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. In Amendment No. 3, the Exchange amended the Certificate of Incorporation to provide that the permit holders may serve on, or nominate candidates for the Board or Committees. The Amendment also added language to the Certificate of Incorporation which clarified that permit holders are not members of the Exchange for purposes of DGCL and shall have no rights or privileges conferred upon members of a nonstock corporation solely by DGCL. In addition to making changes to the language of the Certificate of Incorporation, the Exchange represented that the Board of Governors will appoint a qualified ETP holder, or associated person thereof, to the Exchange's Business Conduct Committee at the next annual appointment of Business Conduct Committee members, presently scheduled for March 2002, and that it

has authorized the Board to issue only 75 permits.

The Commission finds that the Exchange's proposed changes and representations made in Amendment No. 3 further strengthen and clarify the proposed rule change and raise no new regulatory issues. The Commission believes that permitting ETP holders to serve on the Board or Committees, and nominate candidates for the Board, is appropriate and furthers the objectives of Section 6(b)(3) of the Act, which states that the rules of the exchange must assure a fair representation of its members in the selection of its directors and administration of its affairs.<sup>42</sup> These goals are also furthered by the Exchange's commitment to place an ETP holder on the Business Conduct Committee.

Therefore, the Commission finds that granting accelerated approval to Amendment No. 3 is appropriate and consistent with Section 19(b)(2) of the Act.<sup>43</sup>

#### B. SR-Phlx-00-03

The Commission finds good cause for approving Amendment No. 3 to SR-Phlx-00-03 prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. In Amendment No. 3, the Exchange amended Rule 23(a) to provide that the Exchange may issue a maximum of 75 ETPs.

Amendment No. 3 also clarified in proposed Rule 23(c) that ETPs holders are deemed to be members for purposes of eligibility requirements to serve on the Board or Exchange Committees and for the purpose of nominating candidates for the Board. The Commission believes that permitting ETP holders to serve on, and nominate candidates for, the Board or Committees is appropriate and furthers the objectives of Section 6(b)(3) of the Act, which states that the rules of the exchange must assure a fair representation of its members in the selection of its directors and administration of its affairs.<sup>44</sup>

In addition, Amendment No. 3 added language to proposed Rule 23(c) to clarify that ETPs issued by the Exchange are not "Regular Memberships" or "Convertible Memberships" of the Exchange, and that ETP holders are not members of the Exchange for purposes of DGCL, and shall have no rights or privileges conferred upon members of a nonstock corporation solely by the

DGCL. The amendment clarifies the status of ETPs and ETP holders.

Amendment No. 3 also added language to proposed Rule 23(i) to make clear that ETP organizations will be required to post security with the Exchange, the proceeds of which may be applied by the Exchange upon termination of any ETP in the same manner as proceeds of membership transfers under Exchange By-Law 15-3. Exchange By-Law 15-3 provides that the proceeds from the transfer of a membership shall be applied by the Exchange to satisfy existing claims against such member. Again, the Commission believes that this change is merely to clarify the procedure that will be followed in the event an ETP is terminated.

Finally, Amendment No. 3 makes technical non-substantive changes to the proposal to ensure internal consistency exists in the Exchange rules.

The Commission finds that the Exchange's proposed changes in Amendment No. 3 further strengthen and clarify the proposed rule change. Therefore, the Commission finds that granting accelerated approval to Amendment No. 3 is appropriate and consistent with Section 19(b)(2) of the Act.<sup>45</sup>

### VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment Nos. 3, including whether the proposed amendments 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 amendment that are filed with the Commission, and all written communications relating to the amendment 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 at the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Phlx.

All submissions should refer to File Nos. SR-Phlx-00-02 and SR-Phlx-00-03 and should be submitted by February 8, 2002.

<sup>41</sup> See Amendments No. 3 to SR-Phlx-00-02 and SR-Phlx-00-03, *supra* notes 7 and 14. The Act requires an Exchange to "assure a fair representation of its members in the selection of its directors and administration of its affairs \* \* \*." See Section 6(b)(3) of the Act, 15 U.S.C. 78f(b)(3). This requirement serves to ensure that an exchange is administered in a way that is equitable to all those who trade on the Exchange. In approving this proposed rule change, the Commission notes that the Exchange may not issue more than a significant number of ETPs in relationship to their 505 Regular Memberships. Also, the Commission Notes that the Exchange currently has 52 members using a membership on the equity floor. These members are eligible to serve on the Nominating and Election Committee and the Business Conduct Committee, and currently such a member serves on each Committee. The Exchange has also committed to appointing a qualified ETP holder to the Business Conduct Committee. Telephone conversation between Edith Hallahan, First Vice President and Deputy General Counsel, Phlx, and Florence Harmon, Senior Special Counsel, Division, Commission, on January 9, 2002.

<sup>42</sup> 15 U.S.C. 78f(b)(3).

<sup>43</sup> 15 U.S.C. 78f(b)(2).

<sup>44</sup> 15 U.S.C. 78f(b)(3).

<sup>45</sup> 15 U.S.C. 78s(b)(2).

## VII. Conclusion

For all of the aforementioned reasons, the Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>46</sup> that the proposed rule changes (SR-Phlx-00-02 and SR-Phlx-00-03), as amended, are approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>47</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

[FR Doc. 02-1300 Filed 1-17-02; 8:45 am]

BILLING CODE 8010-01-M

## SMALL BUSINESS ADMINISTRATION

### Data Collection Available for Public Comments and Recommendations

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new and/or currently approved information collection.

**DATES:** Submit comments on or before March 19, 2002.

**ADDRESSES:** Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimate is accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collection, to Louis Cupp, New Markets Policy Analyst, Office of New Markets Venture Capital (NMVC) program, Small Business Administration, 409 3rd Street, SW., Suite 6000.

**FOR FURTHER INFORMATION CONTACT:**

Louis Cupp, New Markets Policy Analyst, Office of New Markets Venture Capital (NMVC) program, 202-205-6510 or Curtis B. Rich, Management Analyst, (202) 205-7030.

**SUPPLEMENTARY INFORMATION:**

**Titles:** NMVC Program Application, Funding and Reporting.

**Form No's:** SBA Forms 2184, 2185, 2069, 468, 468 (short form), 468, (Schedule 9,10,11) 480 and 1031 Standard Forms (SF's are under OMB Control) 269, 270, 272, 424, 424A and 424B.

*Description of Respondents:* NMVC Program applicants and participants; SSBICs receiving grants under the NMVC program.

*Annual Responses:* 947.

*Annual Burden:* 11,538 hours.

**Jacqueline White,**

Chief, Administrative Information Branch.

[FR Doc. 02-1314 Filed 1-17-02; 8:45 am]

BILLING CODE 8025-01-P

## SMALL BUSINESS ADMINISTRATION

[License No. 04/74-0285]

### Delta Venture Partners I, L.P.; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Delta Venture Partners I, L.P., 8000 Centerview Parkway, Suite 100, Cordova, TN 38018, a Federal Licensee under the Small Business Investment Act of 1958, as amended ("the Act"), in connection with the financing of a small concern, has sought an exemption under Section 312 of the Act and Section 107.730, Financings which Constitute Conflicts of Interest of the Small Business Administration ("SBA") Rules and Regulations (13 CFR 107.730 (2000)). Delta Venture Partners I, L.P. proposes to provide equity/debt security financing to Nextek, Inc., 201 Next Technology Drive, Madison, AL 35758. The financing is contemplated for plant expansion and working capital.

The financing is brought within the purview of Section 107.730(a)(1) of the Regulations because Nextek Investment Partners, L.P. and Nextek Investment Partners II, L.P., Associates of Delta Venture Partners I, L.P., currently jointly own greater than 10 percent of Nextek, Inc., and therefore Nextek, Inc., is considered an Associate of Delta Venture Partners I, L.P., as defined in Sec. 107.50 of the regulations.

Notice is hereby given that any interested person may submit written comments on the transaction to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

Dated: December 5, 2001.

**Harry Haskins,**

Acting Associate Administrator for Investment.

[FR Doc. 02-1313 Filed 1-17-02; 8:45 am]

BILLING CODE 8025-01-P

## TENNESSEE VALLEY AUTHORITY

### Guntersville Reservoir Land Management Plan, Jackson and Marshall Counties, Alabama and Marion County, TN

**AGENCY:** Tennessee Valley Authority (TVA).

**ACTION:** Issuance of record of decision.

**SUMMARY:** This notice is provided in accordance with the Council on Environmental Quality's regulations (40 CFR parts 1500 to 1508) and TVA's procedures implementing the National Environmental Policy Act. TVA has updated its 1983 land management plan for 40,236 acres of TVA-managed land on Guntersville Reservoir in Alabama and Tennessee. TVA will use the plan to guide land use approvals, private water-use facility permitting, and resource management decisions. On September 19, 2001, the TVA Board of Directors decided to adopt the preferred alternative (Alternative B3, Blended Alternative) identified in the Final Environmental Impact Statement (EIS) and Land Management Plan, Guntersville Reservoir. A Notice of Availability of the Final EIS was published in the **Federal Register** on August 11, 2001. Under the adopted land plan, TVA has allocated undeveloped lands for public recreation and natural resource conservation, and has also been responsive to local requests for use of TVA lands for water access and community development. Of the 40,236 acres of TVA lands on the reservoir which are available for allocation, 37,662 acres would be allocated to resource conservation, sensitive resource management, TVA project operation, or dispersed recreation uses; 1,704 acres would be allocated for developed recreation uses such as marinas, campgrounds, parks, and boat ramps; 543 acres would be allocated for residential lake access, and 327 acres for industrial access or commercial uses.

**FOR FURTHER INFORMATION CONTACT:**

Harold M. Draper, NEPA Specialist, Environmental Policy & Planning, Tennessee Valley Authority, 400 West Summit Hill Drive, WT 8C, Knoxville, Tennessee 37902-1499; telephone (865) 632-6889 or e-mail hmdraper@tva.gov.

**SUPPLEMENTARY INFORMATION:**

Guntersville Reservoir is a 76-mile long reservoir completed in 1939. Although 109,671 acres were acquired for construction of the reservoir, 56,300 are covered by water. Subsequent transfers of land by TVA for economic, industrial, residential, or public recreation development have resulted in a current

<sup>46</sup> 15 U.S.C. 78s(b)(2).

<sup>47</sup> 17 CFR 200.3-3(a)(12).