

improve the processing of buy-ins of CNS positions.³ The proposed procedures provide that a Buy-In Notice may be filed by an originator on successive days provided the succeeding Buy-In Notice does not specify a quantity of securities covered by the prior Buy-In Notice and the quantity of securities representing the sum of all Buy-In Notices does not exceed the member's total long position.⁴

The Retransmittal Notice would be revised to include the identity of the originator on the Retransmittal Notice so that the member owing securities can contact the originator to arrange delivery.⁵ Regardless of any agreements that may have been entered into between a member owing securities and an originator, unless the originator notifies NSCC in a timely manner that its Buy-In Order should not be executed, members who receive Retransmittal Notices and do not satisfy them assume liability for the loss, if any, which occurs as a result of an originator's Buy-In Order.⁶

The proposed rule change also would require members to electronically transmit Buy-In Notices and Buy-In Orders through an automated format determined by NSCC thereby eliminating the practice of hand and facsimile deliveries. Similarly, NSCC proposes to transmit through an automated format Retransmittal Notices to members.⁷

NSCC has determined that subject to SEC approval it will target implementation of the proposed Buy-In changes for the third quarter of 2001. Members will be advised of the specific date prior to implementation.⁸

NSCC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act⁹ and the rules and regulations thereunder applicable to NSCC because it will facilitate the prompt and accurate clearance and settlement of buy-in

transactions by automating and improving the processing of buy-ins.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NSCC does not believe that the proposed rule change will have an impact on or impose a burden on competition.

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

No written comments relating to the proposed rule change have been solicited or received.¹⁰ NSCC will notify the Commission of any written comments received by NSCC.

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

Within thirty-five 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 ninety 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 the self-regulatory organization 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, N.W., Washington, D.C. 20459-0609. 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 Section, 450 Fifth Street, NW.,

Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of NSCC. All submissions should refer to File No. SR-NSCC-2001-07 and should be submitted by September 19, 2001.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01-21790 Filed 8-28-01; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44733; File No. SR-Phlx-99-52]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Philadelphia Stock Exchange, Inc. Adopting Rule 51, Enforcement of Capital Funding Fee

August 22, 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 6, 1999, 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 Exchange. The Phlx filed an amendment to the proposal on August 9, 2001.³ The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

A. The Rule Language

The Phlx proposes to adopt new Rule 51, enforcement of Capital Funding Fee, which relates to the ability of the Exchange to take certain specified

³ Proposed changes to NSCC Rule 11, Sections 7(b) and (c); NSCC Procedure VII, Section J; and NSCC Procedure X, Section A. Also, proposed changes to NSCC Procedure VII, Section E3 to conform its language to the language proposed in NSCC Procedure VII, Section J.

⁴ Proposed changes to NSCC Procedure VII, Section J.

⁵ Proposed changes to NSCC Rule 11, Section 7(b).

⁶ Proposed changes to NSCC Procedure X, Section A 1.

⁷ Proposed changes to NSCC Rule 11, Sections 7(b) and (c).

⁸ As originally filed, the proposed Buy-In changes were to be implemented by NSCC on June 8, 2001.

⁹ 15 U.S.C. 78q-1.

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Letter from Cynthia Hoekstra, Counsel, Phlx, to Nancy Sanow, Assistant Director, dated August 8, 2001 ("Amendment No. 1"). In Amendment No. 1 the Phlx represented that the proposed Rule 51 complies with Delaware corporate law, Pennsylvania contract law, and the Exchange's Certificate of Incorporation, by-laws, and rules. In addition, the Phlx modified the timing of the enforcement procedures for failure to pay the capital funding fee and included a provision for equitable reversion.

¹⁰ In 1998 the Securities Operations Division of the Securities Industry Association formed a committee that studied, worked with, and supported NSCC in its enhancement of its buy-in rules and procedures.

measures if an owner of a membership⁴ fails to pay (or have paid on its behalf) any capital funding fee imposed by the Exchange when due.⁵ New language in *italics*.

Rule 51. Enforcement of Capital Funding Fee.

Notice and Late Charges

(a) The Exchange shall issue invoices to each owner (for purposes of this Rule, an "Obligor") providing notice of the obligation to pay the capital funding fee within twenty days from the invoice date. If an Obligor fails to pay the Exchange the capital funding fee by the due date, the Exchange shall provide a written Late Notice of such failure (the "Late Notice") and, subject to subsection (b), impose a late charge at a monthly rate of 1 percent (simple interest) for each thirty-day period or fraction thereof, calculated on a daily basis, commencing with the twenty-first day.

Waiver of Late Charges

(b) The Finance Committee or its Designee may waive the amount of the late charge, or a portion thereof, if good cause is shown.

For purposes of this Rule, any determination of "good cause" shall be based upon the following factors: consideration of the lateness of the payment, the frequency of the late payments by a particular Obligor, the reason for the late payment, the amount outstanding, the existence and reasonableness of a payment plan proposed by the Obligor, and the financial hardship that the remedy would cause the Obligor.

Suspension of Obligor and Rights of Lessee

(c) If an Obligor fails to pay any portion of the capital funding fee, including the late charge described in subsection (a) above, within 30 days after the date of the Late Notice, the Board of Governors (or, if authorized by the Board, a committee of the Board, the

Chairman of the Board, or a Designee of the Board) (collectively, "the Board or its Designee"), shall suspend the right to trade or otherwise conduct business at the exchange, and suspend the Obligor's right to lease the relevant membership, subject to the ability of the current lessee to continue leasing to the extent provided in this paragraph and paragraph (d), below.

The Exchange shall provide the lessee with notice of the provisions contained in subparagraphs (c)(i) and (c)(ii) and paragraph (d) below, at the same time it provides the Obligor with the Late Notice.

Within 25 days after the date of the Late Notice, the Obligor may request in writing that the Board or its Designee postpone suspending the Obligor's rights, and the Board or its Designee postpone these remedies, with or without qualification, if it decides that good cause has been shown by the Obligor. The Obligor's rights shall not be deemed suspended pending consideration by the Exchange of the request.

The Exchange shall provide the Obligor with notice that the Board or its Designee shall take any of the above-referenced action at the same time as it provides the Obligor with the Late Notice.

Lessee Elects to Pay Capital Funding Fee

(i) For a period of up to three months from the date that the Obligor is suspended from the right to lease, the lessee may pay the capital funding fee plus any applicable late charges owed the Exchange by the Obligor in respect to that membership, and set off such amounts from the amounts due the Obligor in accordance with Rule 930(k).

The lessee's authority to pay the capital funding fee pursuant to this Rule is without prejudice to any right of the Obligor or lessee to terminate the lease agreement for other reasons pursuant to its terms or Rule 930(e). Absent such termination, the existing lease agreement shall remain in effect for the months for which the capital funding fee charges are paid by the lessee pursuant to this subsection and shall then terminate unless the delinquency has been cured.

Lessee Does Not Elect to Pay Capital Funding Fee

(ii) If the lessee does not elect to pay the capital funding fee, plus any applicable late charges, the lease agreement shall terminate 30 days from the date of the Late Notice (absent earlier termination by the Obligor or lessee), notwithstanding the provisions in Rule 930(b) and (e) unless the

delinquency has been fully cured. The lessee shall remit the amount of the capital funding fee plus late charges to the Exchange, up to the amount of his or her outstanding lease payment(s) due during this 30 day period, and set off such amount from the lease payment(s).

Temporary Trading Privileges

(d) The lessee may apply in writing to the Exchange no later than 10 days prior to the termination of the lease agreement pursuant to subparagraphs (c)(i) or (ii) above to continue trading under temporary trading privileges for a period of up to three months from the Obligor's suspension. The Exchange shall approve or disapprove a properly submitted application within 10 days of receiving the written application unless such approval violates Exchange rules or By-Laws or its Certificate of Incorporation.

(i) If a lease agreement terminates while an application for temporary trading privileges is pending, the lessee may trade as though approval has been granted, but for no more than ten days after the Exchange received the application, pending the approval or disapproval by the Exchange of the application.

(ii) The economic terms of the temporary trading privileges shall be at the current prevailing rate for lease agreements on the Exchange (as determined by the Board or its Designee). A lessee trading under temporary trading privileges continues the rights of a member, including the right to vote (if applicable) and the duty to continue paying to the Exchange any fees or dues otherwise applicable. While trading privileges are extended to the lessee, the Obligor shall be unable to lease the relevant membership.

(iii) The lessee, while trading under temporary privileges, shall be subject to the obligations and entitled to the rights of a member, but shall not be entitled to any rights of an owner of a membership with respect to that membership.

Reversion of Equitable Title

(e) If any portion of the capital funding fee in respect of a membership, including the late charge, is not paid (or payment of the late charge has not been waived or the obligation to pay has not been suspended as provided herein), within 30 days after the date of the Late Notice, the Obligor shall be notified by certified mail that the Board of its Designee shall authorize the reversion of equitable title for such membership to the Exchange, followed by sale of the equitable title for such membership by the Exchange, or any other action it

⁴ The term "owner" is defined as any person who or which is a holder of equitable title to a membership in the Exchange. See Exchange Certificate of Incorporation, Article Twentieth.

⁵ 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).

deems appropriate if the capital funding fee, including any applicable late charges, are not received by the Exchange within 90 days after the date of the original invoice or such longer period for which a lease agreement is in effect as a result of the election by a lessee to continue paying the capital funding fee as described in (c)(i) above.

(i) The Obligor may request in writing at least 10 days before the 90 day deadline identified above in subparagraph (e) that the Board or its Designee suspend these remedies or impose an alternate remedy proposed by the Obligor, and the Board or its Designee may do so if it decides that good cause is shown by the Obligor.

(ii) If the Obligor has timely submitted a request for suspension of the sale of the Obligor's equitable title or for imposition of an alternate remedy, the Exchange shall not take steps to sell the Obligor's equitable title until the Board or its Designee decides the request in accordance with the guidelines for demonstrating good cause and provides written notice to the Obligor of its decision.

(f) Any excess monies realized by the Exchange from the sale of the delinquent membership over all amounts owed to the Exchange and to others in accordance with the provisions provided in Exchange By-Law Article XV, Section 15-3 and, in the case of a membership that was subject to a lease, to the lessee (if the payments made by the lessee on behalf of the Obligor as described in paragraph (i) exceeded the monthly lease payment amounts), shall be paid to the Obligor.

Miscellaneous

(g) For purposes of this Rule, any notices, applications, or requests to the Exchange or Board or its Designee by the Obligor or lessee must be received in writing by the Secretary of the Exchange during regular business hours.

(h) The provisions and penalties authorized by this Rule shall be in addition to any other penalties, fines or other charges that may be assumed pursuant to Rule 50, the Exchange's By-Laws or otherwise.

B. Discussion of Authority

1. Authority Under Delaware Law

The Exchange states that as a non-stock corporation organized under the Delaware General Corporation Law ("DGCL"), it has the authority to adopt proposed rule 51. The exchange states that Article Twentieth of its Certificate of Incorporation expressly empowers the Board of the Exchange to determine and assess penalties for nonpayment of

fees, including cancellation of a membership and forfeiture of all rights as an owner, lessor, lessee or member. Article Twentieth provides:

Twentieth: In addition to all other powers granted to the Board of Governors by law, this Certificate of Incorporation or otherwise, the Board of Governors shall have the power (i) to assess such fees, dues and other charges upon members, member organizations, owners (as defined below), lessors and lessees of memberships and holders of permits (or any of them) as the Board of Governors may from time to time adopt by resolution or set forth in the Rules of the Board of Governors, and (ii) to assess penalties for failure to pay any fees, dues or other charges owed to the Corporation, including, without limitation, cancellation of a membership or permit (which membership or permit may be reissued) and forfeiture of all rights as a member, member organization, owner (as defined below), lessor, lessee or holder of a permit. The Board of Governors may authorize any committee thereof or the Chairman of the Board of Governors to exercise any powers of the Board of Governors with respect to the assessment of fees, dues, other charges and penalties. The fees, dues, other charges and penalties authorized in accordance with this Article shall be in addition to any fees, dues, other charges or penalties imposed pursuant to any provision of the By-Laws of the Corporation. For purposes of this Certificate of Incorporation and (unless otherwise expressly stated therein) the rules of the Corporation and any schedule of fees, dues, other charges or penalties which the Corporation may establish, the term "owner" (whether or not capitalized) shall mean any person or entity who or which is a holder of equitable title to a membership in the Exchange.⁶

In addition, the Exchange represents that 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);⁷ By-Law Art. IV, § 4-4.

⁶ See Securities Exchange Act Release No. 42773 (May 11, 2000), 65 FR 31622 (May 18, 2000) (SR-Phlx-00-30).

⁷ 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 as and perform all functions of a national securities exchange and engage in any

The Exchange states that numerous provisions of the Exchange's by-laws and rules already address matters similar to those addressed by proposed Rule 51.⁸ Moreover, the Exchange states that its by-laws require lessors and lessees (as members) to pledge to abide by the rules as they may be amended from time to time.⁹

Accordingly, under the DGCL and the Exchange's Certificate of Incorporation, by-laws and rules, the Board of Governors of the Exchange has the authority to adopt Rule 51.

2. Permissibility Under Pennsylvania Contract Law

The Exchange contends that proposed Rule 51, relating to the suspension of a lessor's right to lease, termination of lease agreements, issuance of temporary trading privileges, and collection of fees from members and set off as described in Rule 930(k),¹⁰ is also permissible as a matter of Pennsylvania contract law for two primary reasons. First, the Exchange states that it may adopt by-laws, rules, or regulations that affect lessors and members pursuant to the express terms of its contractual relationships with the lessors and members and thus any interference with or alteration of extant lease agreements by proposed Rule 51 would be contractually permissible. Second, the Exchange states that it is a third party beneficiary of the lease agreements, and this status provides an additional contractual basis for the collection and set off provisions of proposed Rule 51. (The Exchange states that future lease agreements would of course be deemed

lawful act or activity for which corporations may be organized under the DGCL).

⁸ See, e.g., By-Law Art. XIV § 14-5 (providing that membership may be "disposed of" by Admissions Committee in certain circumstances for nonpayment of dues or fines); By-Law Art. XIV, § 14-2 (authorizing Board to fix and impose charges upon members and member organizations); Rule 50 (authorizing suspension of members or member organizations for nonpayment of charges); By-Law Art. XV, § 15-1(a) (providing that a membership may be leased in accordance with such rules as the Board may adopt); Rule 930 (setting forth required terms of a 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).

⁹ See 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.

¹⁰ See Securities Exchange Act Release No. 443865 (June 4, 2001), 66 FR 30971 (June 8, 2001) (approving SR-Phlx-2001-45).

to incorporate the terms of Rule 930(k) within them, obviating any contract law question.)

a. Lease Terms Incorporate Relevant Terms of Exchange Articles of Incorporation, By-Laws, and Rules

The Exchange represents that, under the terms and conditions pursuant to which the Exchange awards the privileges of membership and approves the right of an owner to lease a seat, it reserves the right to adopt authorized by-laws, rules, or regulations that affect those lessors and lessees, and, accordingly, any potential impact on lease agreements of Rule 51 would be contractually permissible.¹¹ The Exchange states that 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. The Exchange represents that, 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." See By-Law Art. XII, § 12-9(b). Lessees (as members) likewise make the same commitment. See *id.* at 12-9(a). It argues that, by agreeing to abide by future by-laws, rules, and regulations, lessors and lessees necessarily grant permission to the Exchange to adopt rules pursuant to which their lease agreements may be affected.¹² Accordingly, it argues that Rule 51, which would provide in express form the authorization for the alteration of or interference with lease agreements, would simply authorize that which is countenanced by the terms of the Exchange's existing relationships with lessors and lessees, and is thereby permissible as a matter of Pennsylvania contract law.

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

Moreover, the Exchange states that it is already, as a matter of Pennsylvania law, a third party beneficiary of lease agreements and would as such be entitled to provide for collection of

Exchange fees from a lessee upon the default of a lessor, and to permit set-off by the lessee. The Exchange states that 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 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 argues that it is a third party beneficiary of lease agreements in accordance with the intention expressed in the lease agreements themselves. It states that Rule 930(c) already 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." The Exchange represents that, as the purpose of the lease agreement is to permit the lessee the "use of membership," proposed Rule 930(k) simply specifies the circumstances in which the Exchange, rather than requiring payment by the lessee of one such fee, is imposing the lesser obligation of allowing the payment by a lessee. The Exchange also states that likewise, many of the other mandatory terms of the lease agreements, imposed by Exchange rule, also manifest the parties' clear intent to make the Exchange a beneficiary. See 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, the Exchange represents that, in addition to the intent manifested in the lease agreements, which is itself sufficient to render the Exchange a third party beneficiary, the circumstances surrounding the lease agreements independently compel the same conclusion. As noted, the Exchange

states that the lease agreements are pursuant to Exchange rules, replete with references to the Exchange, see Rule 930, and reference to a third party in the contract itself is a strong indication that the party is a third party beneficiary. The Exchange also notes that it exercises numerous rights related to the lease agreements. The Exchange states that it approves lessors, as well as lessees. See Rule 931 (approval of lessors); and By-Law Art. XV, § 15-1 (approval of lessees). The Exchange represents that it also requires lessors and lessees to abide by the Exchange's by-laws. See By-Law Art. XII, §§ 12-9 (a), (b); and Rule 930(j). Indeed, the Exchange states that the purpose of the lease agreement is to permit trading on the Exchange. See By-Law Art. XII, § 12-1 (a member conducts business on the Exchange). The Exchange also represents that it reserves the right to approve all transfers of membership pursuant to a lease agreement. Rule 930 (a), (d) and (e). Finally, as noted, the Exchange represents that 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 51 identifies under what circumstances the lessee may, at his or her option, remit one such fee to the Exchange.¹³

The Exchange argues that it is, accordingly, a third party beneficiary to the lease agreements with the right to allow the provision of payment of fees and set off in proposed Rule 51.

Therefore, the Exchange states that, as a condition of membership and of the right to lease seats, the Exchange's adoption of Rule 51 is a permissible alternation or interference with extant lease agreements, and, as a third party beneficiary, the Exchange's provision for collection and set off in proposed Rule 51 are contractually permissible under Pennsylvania law.

In sum, the Exchange contends that adoption by the Exchange of proposed Rule 51 would be consistent with applicable corporate governance and contract law.

¹³ 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 case law elsewhere that when the contracting parties, and a third party have a sufficiently intertwined business relationship, the third party is deemed to be a 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 alternative basis for the legal adequacy of the Exchange's provision for collection and set off in proposed Rule 51.

¹¹ See footnote 9, *supra*, for various rules that are lawful in accordance with the conditions of membership and of the right to lease.

¹² We note that the Exchange has also previously explained to the Commission when proposing Article Nineteenth and Rule 930(k) that that Article and Rule are likewise consistent with Pennsylvania contract law for this same reason. See Securities Exchange Act Releases Nos. 43987 (February 20, 2001), 66 FR 12582 (February 27, 2001) (SR-Phlx-99-50) and 43865 (June 4, 2001), 66 FR 30971 (June 8, 2001) (SR-Phlx-2001-45).

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

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

The Exchange states that the purpose of the proposed rule change is to adopt new Rule 51, which specifies what enforcement action may be taken against an owner for failure to pay any capital funding fee imposed by the Exchange. The Exchange represents that a new rule is required because existing Exchange rules do not comprehensively address situations in which owners, as opposed to members or member organizations, are required to pay the Exchange any fees. In addition, the Exchange states that capital funding fee invoices are sent out separately from other Exchange invoices and are subject to a different payment schedule. Therefore, the Exchange represents that the remedies of late payments that are addressed in current Exchange Rule 50 are not appropriate.¹⁴

In addition, the Exchange notes that proposed Rule 51 delineates the remedies that shall be taken by the Board if the capital funding fee is not paid. The Exchange notes that the rule allows for a variety of remedies ranging from the imposition of a late fee to reversion and sale by the Exchange of the equitable title to a membership. The Exchange notes that the remedies are set forth in such a way as to apply the less onerous remedies (*i.e.*, like fees) first and the more serious remedies (*i.e.*, suspension of right to trade or lease and reversion of membership) only after the Exchange has not received payment within 90 days after the date of the original time period (or such longer period as necessary if a lease is in effect as a result of the election by a lessee to continue paying the capital funding fee). The Exchange represents that, by

allowing this graduated scale of remedies, the owners are put on notice as to what remedies will be imposed if payment is not received in a timely manner, with the more serious remedies being applied after a longer period of time. In addition, the Exchange represents that proposed Rule 51 delineates the Board's responsibilities and authority for handling instances when an owner fails to pay the capital funding fee when due. The Exchange states that the Rule is designed to protect innocent lessees from being unexpectedly dispossessed from their memberships and trading rights in the event of a nonpayment by their lessors. The Exchange represents, that, by electing to pay the capital funding fee on behalf of an owner, the lessee may continue trading under his/her existing membership for up to three months. The Exchange states that, at the end of this period, or in the event that the lessee elects not to pay the fee on behalf of the lessor, the lessee may apply for temporary trading privileges.

The Exchange states that the amount and capital contribution structure of this fee are vastly different from other Exchange fees, as is the purpose. In fact, the Exchange represents that the Board determined that the enforcement mechanisms outlined in proposed Rule 51 were necessary to effectuate the Exchange's capital funding fee, a central aspect of the Exchange's capital plan, for the continued viability and competitiveness of the Exchange.

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,¹⁵ in general, and with Section 6(b)(5),¹⁶ in particular because it promotes just and equitable principles of trade and protects investors and the public interest by providing an enforcement mechanism which should, in turn, ensure prompt payment of capital funding fees to the Exchange by an owner.

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

The Exchange believes that the proposed rule change will not 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

No written comments were either solicited or received.

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, as amended, 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-99-52 and should be submitted by September 19, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Margaret H. McFarland,
Deputy Secretary.

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¹⁴ See Phlx Rule 50, Late Charge.

¹⁵ 15 U.S.C. 78f(b).

¹⁶ 15 U.S.C. 78f(b)(5).

¹⁷ 17 CFR 200.30-3(a)(12).