

investors with timely access to material corporate information.<sup>6</sup> According to the Commenter, when an issuer files a Form 8-K with the Commission, investors will receive the information only if investors (1) know when to anticipate the disclosure; (2) know where to find the information; and (3) have access to the Commission's Web site or a site carrying EDGAR content.<sup>7</sup> The Commenter believes that allowing only the filing of a Form 8-K in satisfaction of disclosure requirements would reduce the possible dissemination of information to the investing public.<sup>8</sup>

The Commenter suggests that requiring the filing of a Form 8-K in tandem with a news release distributed by a commercial newswire service and posted on an issuer's Web site will "fully address the desired goals."<sup>9</sup> Additionally, the Commenter believes that the scope of dissemination of such a press release should "correspond to dissemination that the issuer normally effects with respect to its results of operations."<sup>10</sup> The Commenter suggests that disclosure through a press release should require dissemination of the entire text of the press release, to avoid providing limited and selective disclosure, in contrast to the information obtained by those who obtain the complete press release.<sup>11</sup>

#### *Nasdaq's Response Letter*

Nasdaq believes that the filing of a Form 8-K provides "effective, broad and non-exclusionary public disclosure," and that requiring the issuance of a press release in tandem with filing a Form 8-K would place a burden on issuers while providing "no significant benefit to investors."<sup>12</sup> Nasdaq states that filings made with the Commission via EDGAR are available on "most major financial news Web sites and Web portals," and lists a number of Web sites that have direct links to issuers' filings.<sup>13</sup> In addition to obtaining this information via the Internet, Nasdaq notes that filing of a Form 8-K may result in media coverage, and that under Nasdaq rules, issuers must provide notification of material news announcements, including those made by filing a Form 8-K, to Nasdaq's Market Watch Department before disseminating them to the public. The Market Watch Department evaluates

such information for materiality, and implements trading halts for dissemination of news, if appropriate.<sup>14</sup>

Nasdaq maintains that the proposal is "designed to harmonize its disclosure rules with Regulation FD" to enable issuers to reap the benefits of using "current technologies as part of a comprehensive disclosure strategy," and to address concerns that self-regulatory organization rules override the flexibility provided by Regulation FD.<sup>15</sup>

### **III. Discussion and Commission Findings**

The Commission has reviewed carefully the proposed rule change, the comment letter, and Nasdaq's response to comments, and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association<sup>16</sup> and, in particular, the requirements of section 15A(b)(6) of the Act. Section 15A(b)(6) requires rules that are designed to prevent fraudulent and manipulative acts and practices, and, in general, to protect investors and the public interest. The Commission finds that aligning Nasdaq's disclosure rules with Regulation FD should minimize confusion among issuers, while simultaneously allowing issuers to use current technologies to disseminate material information to the public in a broad, inclusive manner. The Commission makes no finding as to whether requiring issuers to provide a news release to be distributed by a commercial newswire service and posted on the issuer's web site, in addition to filing a Form 8-K, will result in expanding the reach of disclosure to the investing public. The Commission is satisfied that the proposal conforms to the requirements for disclosure as delineated in Regulation FD, and as such, finds it is consistent with the requirements of the Act, in general, and specifically, with section 15A(b)(6).

### **IV. Conclusion**

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>17</sup> that the proposed rule change (SR-NASD-2002-85) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>18</sup>

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

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-46903; File No. SR-NSCC-2002-06]

### **Self-Regulatory Organizations; National Securities Clearing Corporation; Order Granting Approval of a Proposed Rule Change Relating to the Imposition of Fines**

November 25, 2002.

#### **I. Introduction**

On July 26, 2002, National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") proposed rule change File No. SR-NSCC-2002-06 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and on August 21, 2002, amended the proposed rule change. Notice of the proposal was published in the **Federal Register** on August 27, 2002.<sup>2</sup> No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

#### **II. Description**

NSCC's rule change amends Addendum P of its Rules and Procedures to clarify existing fines and to impose new fines upon its members. The rule change specifically sets forth actions or inactions which will result in NSCC imposing fines.<sup>3</sup>

NSCC's Rule 48 allows NSCC to impose fines upon its members for any error, delay, or other conduct that is determined to be detrimental to the operations of NSCC. Historically, NSCC has imposed fines upon members for failures to settle in a timely manner end of day settlement balances, for late settlement acknowledgements, and for late payments of clearing fund deposits.

NSCC's Rule 15 permits NSCC to request that members furnish to NSCC such adequate assurances of their financial responsibility and operational capability as NSCC may at any time deem necessary. Pursuant to this rule

<sup>6</sup> PR Newswire Letter at p.3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at p.4.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 5.

<sup>11</sup> *Id.*

<sup>12</sup> Nasdaq Response Letter at p.2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at p.3.

<sup>16</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>17</sup> 15 U.S.C. 78s(b)(2).

<sup>18</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> Securities Exchange Act Release No. 46385 (August 20, 2002), 67 FR 55051.

<sup>3</sup> Exhibit 1 to this order sets forth NSCC's revised fine schedule.

and in furtherance of NSCC's responsibility, NSCC periodically requests that its members provide financial and operational information about their business. While many members comply with these requests, some do not. The lack of this information could create risk for NSCC. To address this concern, NSCC will fine members who fail to timely respond to requests for such information.

In connection with imposing fines for failure to timely provide requested financial and operational information, NSCC is establishing a list of information items, such as financial statements and disaster recovery procedures, that its members must submit on an ongoing basis so that its members will know exactly what information must be provided and that failure to provide the information will result in a fine being imposed. NSCC will begin assessing fines from the approval of this rule change. For a period of one year from that date, members that fail to timely provide information will be issued one warning letter prior to the imposition of a fine. At the conclusion of the one-year period, NSCC will discontinue the warning letters prior to fining.<sup>4</sup>

Under NSCC's Rules and Procedures, members have an affirmative duty to notify NSCC on an ongoing basis of changes in certain internal conditions that may cause NSCC to reevaluate the member's continued participation. Addendum T. NSCC will fine members that fail to meet these notification requirements. No reminder or warning letter will be sent in this context.<sup>5</sup>

Members will continue to have the ability to contest fines, as currently provided for within NSCC's Rules and

Procedures. Fines imposed against settling members will be collected through a miscellaneous charge in the member's monthly statement of charges. Fines imposed against settling bank members may be collected through an adjustment to the settling bank's end-of-day settlement balance, through a separate fed wire payment, or through a check made payable to NSCC. Alternatively, if the settling bank maintains additional memberships with NSCC, the fine may be collected through a settling account under its additional membership.

In conjunction with the above, NSCC is making a technical correction to Rule 48, Disciplinary Proceedings. In Release No. 34-36866, the Commission approved an NSCC rule change to accommodate same-day funds settlement ("SDFS").<sup>6</sup> That rule change, in part, created Addendum P that set SDFS Failure to Settle fines in the range of \$100 to \$10,000. At that time, Section 1 of Rule 48 should have been modified to change the maximum fine for any single offense from \$5,000 to \$10,000, and a reference to settling bank only members should also have been included. Accordingly, those changes are now being made.

NSCC believes that the proposed rule change is consistent with Section 17A of the Act and the rules and regulations thereunder because it ensures that NSCC is able to safeguard securities and funds in NSCC's possession.

### III. Discussion

Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of

the clearing agency or for which it is responsible.<sup>7</sup> The Commission finds that the proposed rule change allowing NSCC to fine members that fail to timely provide requested financial and operational information or who fail to notify NSCC of changes in conditions that may cause NSCC to reevaluate the member's continued participation should improve NSCC's ability to monitor its members. Accordingly, the Commission believes the proposed rule change is consistent with NSCC's obligation to assure the safeguarding of securities and funds that are in its custody or control or for which it is responsible.

### IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act and the rules and regulations thereunder applicable.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-NSCC-2002-06) be, and hereby is, approved.

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

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

**Exhibit 1:** Text of NSCC'S Revised Rules and Procedures

### Addendum P

#### *Fine Schedule*

(1) SDFS Failure-to-Settle and Late Acknowledgment Fines

Net debit	First occasion	Second occasion	Third occasion	Fourth occasion
\$0-100,000 .....	\$100	\$200	\$500	\$1,000
\$100,000-900,000 .....	300	600	1,500	3,000
\$900,000-1,700,000 .....	600	1,200	3,000	6,000
\$1,700,000-2,500,000 .....	900	1,800	4,500	9,000
\$2,500,000-up .....	1,000	2,000	5,000	10,000

**Notes:** (a) In addition to the fine, interest is charged to the Member, or the Settling Bank Only Member, that failed to settle for the cost of borrowing to complete settlement.

(b) The number of occasions will be determined over a moving three-month period. A Member, or a Settling Bank Only Member, that exceeds four failure-to-settle occasions in a three-month period will be subject to further fees and/or other actions at

the Corporation's discretion after consultation between the Member, or the Settling Bank Only Member, and the Corporation.

(c) If the Corporation determines that it had significantly affected a Member's, or a Settling Bank Only Member's, ability to settle (because of a Corporation system delay, for example), the Corporation may determine to

waive failure-to-settle fines for that occurrence.

(2) Failure to notify and supply required data as provided for under these Rules & Procedures (other than as provided in items one, three and four of this addendum): Each single offense, \$5,000.00 fine.

<sup>4</sup> Addendum P, 4.

<sup>5</sup> Addendum P, 2.

<sup>6</sup> Securities Exchange Act Release No. 36866 (February 27, 1996), 61 FR 7288 [File No. NSCC-

96-03] (order modifying NSCC's Rules and Procedures to accommodate same-day funds settlement).

<sup>7</sup> 15 U.S.C. 78q-1(b)(3)(F).

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

(3) Late Satisfaction of Clearing Fund Deficiency Call <sup>1</sup>

Amount	First occasion	Second occasion	Third occasion	Fourth occasion (or greater)
Up to \$100 M .....	(*)	\$100	\$200	\$500
\$100 M to \$900 M .....	(*)	300	600	1,500
\$900 M to \$1.7 MM .....	(*)	600	1,200	3,000
\$1.7 MM to \$2.5 MM .....	(*)	900	1,800	4,500
Greater than \$2.5 MM .....	(*)	1,000	2,000	5,000

\*First occasions result in a warning letter issued to the Member.

(4) Requests for information <sup>2</sup>

Request for information (failure to timely provide)	First occasion	Second occasion	Third occasion	Fourth occasion
Financial Statements:				
Audited Financial Statements for Member or Parent .....	(*)	\$300	\$600	\$1,500
Monthly and/or Quarterly Regulatory Filings .....	(*)	300	600	1,500
Monthly and/or Quarterly Financial Statements .....	(*)	300	600	1,500
Proforma Financial Statements .....	(*)	300	600	1,500
Any Financial Computations, Consolidating Worksheets or Internal Statements, Upon Special Request .....	(*)	300	600	1,500
Risk Questionnaires/Profiles:				
Questionnaires .....	(*)	150	300	750
Profiles .....	(*)	150	300	750
Risk Management Policies and Procedures .....	(*)	150	300	750
Disaster Recovery Procedures .....	(*)	150	300	750

\*First occasions result in a warning letter issued to the Member. Warning Letters for first occasion violations will be discontinued one year after implementation of this schedule, at which time each violation will be subject to imposition of a fine.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46875; File No. SR-Phlx-2002-70]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc., To Amend Schedule of Dues, Fees and Charges Relating to Floor Brokerage Assessments

November 21, 2002.

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> notice is hereby given that on October 29, 2002, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange

Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the Phlx under Section 19(b)(3)(A)(ii) of the Act,<sup>3</sup> which renders the proposal effective upon filing with the Commission. 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 proposes to amend its schedule of dues, fees and charges by: (1) Suspending the current equity floor brokerage assessment fee of 5 percent of net floor brokerage income through December 31, 2003; and (2) adopting a monthly fee of \$250 for each member

who derives his/her primary income from equity floor brokerage business.<sup>4</sup> For purposes of the \$250 monthly fee, "primary income" means that the member derives at least 80 percent of gross income generated from Phlx floor-based activities from his/her floor brokerage business conducted on the Exchange.<sup>5</sup>

The Phlx intends to suspend the floor brokerage assessment fee of 5 percent for transactions settling on or after November 1, 2002, and implement the \$250 monthly fee beginning November 2002.

The text of the proposed rule change is available at the Phlx and at the Commission. A copy of the Exchange's Summary of Equity Charges is attached to the proposed rule change filed with the Commission as Exhibit 2.

<sup>1</sup> 1 The number of occasions is determined over a moving three-month period beginning with the first occasion.

<sup>2</sup> Fines to be levied for offenses within a moving twelve-month period beginning with the first occasion.

<sup>3</sup> 15 U.S.C. 78s(b)(1).

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

<sup>5</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>6</sup> This fee will be eligible for the monthly credit of up to \$1,000 to be applied against certain fees, dues and charges and other amounts owed to the Phlx by certain members. See Securities Exchange

Act Release No. 44292 (May 11, 2001), 66 FR 27715 (May 18, 2001)(SR-Phlx-2001-49).

<sup>7</sup> For purposes of this proposed rule change, floor brokerage business conducted on the Exchange includes orders that are received on the Phlx, even if those orders are executed on an exchange other than the Phlx.