

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

NASD Regulation does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

See discussion of comment letters in Item II(A)(1) above.

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

Within 30 days after the expiration of the comment period following 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 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, 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 NASD. All submissions should refer to the file number in the caption above and should be submitted by February 14, 2002.¹⁹

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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45188; File No. SR-PCX-2001-33]

Self-Regulatory Organizations; Notice of filing of Proposed Rule Change and Amendment No. 1 by the Pacific Exchange, Inc. To Adopt Procedures for the Transfer of Options Positions

December 21, 2001.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 10, 2001, the Pacific Exchange, Inc. ("PCX" 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 PCS. The Exchange amended the proposed rule change on December 11, 2001.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The PCX proposes to establish procedures for the transfer of options positions. The text of the proposed rule change, as amended, is below. Proposed new language is italicized.

Rule 6.78 (a)-(c) No change.

Transfer of Positions

(d) Transfer of Positions off the Floor. "Transfer of positions off the floor" is defined as moving a member's ownership interest in securities from its

Commission action on this filing until 30 days after the end of the comment period. See Section III.

²⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter dated December 10, 2001 from Cindy Sink, Senior Attorney, Regulatory Policy, PCX, to Joe Morra, Special Counsel, Division of Market Regulation, Commission and attachments ("Amendment No. 1"). In Amendment No. 1, the PCX: (1) Clarified the intent of the rule that after the proper request has been completed, a transfer will be automatically permitted when the transfer satisfies one of the specified categories set forth in proposed Rule 6.78(d)(1); (2) revised Item 8 to state that the proposed rule change is based, in part, on Chicago Board Options Exchange Rule 6.49A; and (3) made technical changes to the rule text.

account to an account of another member or person in a manner other than trading on the floor of a securities exchange.

(1) Transfers off the Floor.

Notwithstanding the prohibition set forth in subsection (a), an Exchange member may transfer positions off the floor if the transfer involves one or more of the following events: (i) The dissolution of a joint account in which the remaining member assumes the positions of the joint account; (ii) the dissolution of a corporation or partnership in which a former nominee of that corporation or partnership assumes the positions; (iii) positions transferred as part of a member's capital contribution to a new joint account, partnership, or corporation; (iv) the donation of positions to a not-for-profit corporation; (v) the transfer of positions to a minor under the Uniform Gifts to Minors Act; (vi) a merger or acquisition resulting in a continuity of ownership or management; or (vii) consolidation of accounts within a member organization.

(2) Written Request. No member or member organization may effect a transfer of positions off the floor in any security listed on the Exchange without the prior submission of a completed written request to the Exchange. This requirement applies regardless of whether the transfer is permitted under subsection (d)(1) or (f).

(e) Transfer of Positions Offered on the Floor. "Transfer of positions offered on the floor" is defined as moving a member's ownership interest in securities from its account to an account of another member or person in circumstances other than those set forth in subsection (d)(1).

(1) Transfer Procedure for Positions Offered on the Floor. A member seeking a transfer must offer the positions on the floor in the following manner:

(A) A member or member organization seeking to transfer positions on the floor ("Transferor") must specify the securities positions to be transferred that are traded on the Exchange or at another securities exchange ("Transfer Positions"). In offering Transfer Positions to the floor, the Transferor must offer a set of options or other financial products being offered by the Transferor as a package ("Transfer Package"), to be bid upon at a net debit or credit for the entire Transfer Package. A single Transfer Package must include no more than one option issue listed on the Exchange, but may also include stock or other securities. A Transferor may offer multiple Transfer Packages on the floor at the same time or on the same day. These offers must be made in a form

¹⁹ The NASD requested a 45 day comment period and has consented to the extension of the time for

and manner prescribed by the Exchange.

(F) Acceptance of the best bid or offer ("BBO") creates a binding contract under Rule 6.77. The Transferor is not obligated to accept the BBO. If the Transferor does not accept the BBO, the Transferor may request an exemption pursuant to paragraph (f) of this Rule, or may offer the Transfer Package(s) (or the Transfer Positions in any other allowable combination) on the floor the next day pursuant to the procedures in this Rule. If the Transferor decides not to accept a BBO on a second day, the Transferor must request permission of two Floor Officials to offer the Transfer Positions on any subsequent day(s).

(G) The "Request Response Time" for a "Request for Quotes" for Transfer Packages is two hours. The transferor may apply to two Floor Officials to have a Request Response Time for a transfer procedure that is less than two hours, where the Transfer Package is not complicated, or that is greater than two hours, where the complexity of the particular Transfer Package warrants the additional time.

(H) A Request for Quotes that is to be submitted later than 11:00 a.m. Pacific Time must have the approval of two Floor Officials. In no event may a Request for Quotes be submitted to the floor later than 12:30 p.m. Pacific Time.

(I) The Transferor may accept a bid or offer for one or more of the Transfer Packages he/she has offered on the floor, if the accepted bid or offer for the combination of the Transfer Packages is equal to or better than the total of the individual BBOs for the particular Transfer Package combination and equal to or greater than any bid or offer for the same combination of Transfer Packages.

(J) All transactions (including stock positions or other positions that must be transacted on another exchange) required to be completed in order to effectuate the transfer of the Transfer Package must be completed in time for the option portion to be transacted by the end of the trading day.

(K) If equal bids or offers are received for a Transfer Package at a price accepted by the Transferor, the Transfer Package will be divided equally among all members submitting the bids or offers to the extent possible unless the parties submitting the bids or offers agree to a division in another manner. Two Floor Officials will resolve Transfer Package division disputes.

(f) Exemptions. The Exchange's Chief Executive Officer or designee thereof may grant an exemption from the requirements of subsection (e), upon that person's own motion or upon

application of a Transferor, when, in the judgment of the Chief Executive Officer or designee, the market value of the Transferor's business will be compromised by having to comply with subsection (e) or when, in the judgment of the Chief Executive Officer or designee market conditions make position transfer offers on the floor impractical. The Chief Executive Officer or designee will consider effects on open interest and other factors deemed necessary to ensure fair and orderly market conditions.

Commentary:

.01 No change.

.02 Acquisitions and dissolutions which all or substantially all of the assets of one member or member organization are required by another or, where there remains no continuity of ownership or management are examples of situations that normally would be required to be subjected to the transfer process set forth in subsections (e) and (f). This list is not meant to be exhaustive, however, and there may be other situations in which there is a discontinuation of ownership or management of the positions that may require that the positions be brought to the floor for transfer. Questions on whether a transfer should be brought to the floor may be directed to the Exchange's Options Surveillance Department.

.03 To the extent applicable, all other Exchange rules, including Rule 6.49, Solicited Transactions, will apply to the transfer procedure set forth in subsections (d) through (f). The following Rules do not apply to transfer procedures: 6.71 (Meaning of Premium Bids and Offers); 6.74 (Bids and Offers in Relation to Units of Trading); 6.75 (Priority of Bids and Offers); 6.76 (Priority of Split Price Transactions); 6.47 ("Crossing" Orders and Stock/Option Orders); and 7.9 (Meaning of Premium Bids and Offers, Index Options).

.04 The procedure established by subsections (d) through (f) may also be used by Market Makers who, for reasons other than a forced liquidation, such as an extended vacation, wish to liquidate their entire, or nearly their entire position in a single set of transactions. However, this procedure is not to be used repeatedly or routinely in circumvention of the normal auction market process.

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 PCX 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 PCX has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The purpose of the proposed rule change is to establish which position transfers may occur off the floor and which position transfers must be offered to the floor.⁴ All transfers require a written request to the Exchange. To initiate transfers, the member submits a written request to the Financial and Operational Compliance Department ("FOCD").

(1) *Transfer of Positions off the Floor.* Transfers involving the following will be approved by the FOCD:

(A) Joint account dissolution with remaining member assuming the positions;

(B) Business dissolution with a former nominee assuming the positions;

(C) Positions transferred as capital contribution to a new joint account, partnership, or corporation;

(D) Donation of positions to a not-for-profit corporation;

(E) Transfer to a minor under the Uniform Gifts to Minors Act;

(F) Merger or acquisition with continuity of ownership or management; or

(G) Accounts consolidation within a member organization.

Transfers that fall under one or more of these seven categories ((A) through (G)) that submit the proper request information qualify for transfer off the Floor. However, the transferor may elect to present to the floor.

(2) *Transfer of Positions Offered on the Floor.* Transfers not involving one of the above seven categories ((1)(A) through (G)) will be sent to the Options Surveillance Department (OSD") by the FOCD for assistance in offering the transfer to the floor. When a transfer is offered to the floor, the procedure detailed in proposed subsection (e) applies. Specifically, a member or member organization seeking to transfer positions on the floor ("Transferor") must specify the securities positions to be transferred that are traded on the Exchange or at another securities

⁴ The rule is based, in part, on the Chicago Board Options Exchange Rule 6.49A.

exchange ("Transfer Positions"). In offering Transfer Positions to the floor, the Transferor must offer a set of options or other financial products being offered by the Transferor as a package ("Transfer Package"), to be bid upon at a net debit or credit for the entire Transfer Package. A single Transfer Package must include no more than one option issue listed on the Exchange, but may also include stock or other securities. A Transferor may offer multiple Transfer Packages on the floor at the same time or on the same day. These offers must be made in a form and manner prescribed by the Exchange.

A Transfer Package consisting solely of positions in one option issues and no other securities will be offered by the Transferor at the post at which that option issue is traded ("Post-Specific Transfer Packages"). Post-Specific Transfer Package must be individually priced and reported. Post-Specific Transfer Packages are subject to the ordinary procedures for trading options, and not those set forth in proposed subsection (e), unless a bid or offer is made for a combination of Transfer Packages pursuant to proposed subsection (e)(1)(I).

A Transfer Package consisting of positions in an option issue and other financial instruments must be offered at the FLEX Post. In addition, notice must be given to the order book official ("OBO") of each post (or the lead market maker for the particular issue, as appropriate) where a component of the Transfer Package trades. The OBO will announce the pending transfer of positions prior to the offer being made at the FLEX post.

A member submitting a Transfer Package must designate a member of the Exchange ("Transferor Designee") to represent the order on the floor. The Transferor Designee must be available to answer questions regarding the Transfer Package during the entire Request Response Time (as defined in proposed subsection (e)(1)(G)).

To the extent applicable and as modified by proposed subsection (e), Transfer Packages offered at the FLEX post will be subject to the procedures set forth in PCX Rule 8.103 (FLEX Trading Procedures and Principles) paragraphs (a) through (c).

Acceptance of the best bid or offer ("BBO") creates a binding contract under PCX Rule 6.77. The Transferor is not obligated to accept the BBO. If the Transferor does not accept the BBO, the Transferor may request an exemption pursuant to proposed subsection (f), or may offer the Transfer Package(s) (or the Transfer Positions in any other allowable combination) on the floor the

next day pursuant to the procedures in proposed subsection (d). If the Transferor decides not to accept a BBO on a second day, the Transferor must request permission of two Floor Officials to offer the Transfer Positions on any subsequent day(s).

The "Request Response Time" for a "Request for Quotes" for Transfer Packages is two hours. The Transferor may apply to two Floor Officials to have a Request Response Time for a transfer procedure that is less than two hours, where the Transfer Package is not complicated, or that is greater than two hours, where the complexity of the particular Transfer Package warrants the additional time.

A Request for Quotes that is to be submitted later than 11:00 a.m. Pacific Time must have the approval of two Floor Officials. In no event may a Request for Quotes be submitted to the floor later than 12:30 p.m. Pacific Time.

The Transferor may accept a bid or offer for one or more of the Transfer Packages he/she has offered on the floor, if the accepted bid or offer for the combination of the Transfer Package is equal to or better than the total of the individual BBOs for the particular Transfer Package combination and equal to or greater than any bid or offer for the same combination of Transfer Packages.

All transactions (including stock positions or other positions that must be transacted on another exchange) required to be completed in order to effectuate the transfer of the Transfer Package must be completed in time for the option portion to be transacted by the end of the trading day.

If equal bids or offers are received for a Transfer Package at a price accepted by the Transferor, the Transfer Package will be divided equally among all members submitting the bids or offers to the extent possible unless the parties submitting the bids or offers agree to a division in another manner. Two Floor Officials will resolve Transfer Package division disputes.

The Exchange's Chief Executive Officer or designee thereof may grant an exemption from the requirement of proposed subsection (e), upon that person's own motion or upon application of a Transferor, when, in the judgment of the Chief Executive Officer or designee, the market value of the Transferor's business will be compromised by having to comply with proposed subsection (e) or when, in the judgment of the Chief Executive Officer or Designee market conditions make position transfer offers on the floor impractical. The Chief Executive Officer or designee will consider effects on open interest and other factors deemed

necessary to ensure fair and orderly market conditions.

2. Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act,⁵ in general, and furthers the objectives of Section 6(b)(5),⁶ in particular, because it is designed to promote just and equitable principles of trade, to enhance competition and to protect investors and the public interest.

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

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

Written comments on the proposed rule change were neither solicited nor 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 the PCX consents, the Commission will:

(A) By order approve the proposed rule change, as amended, or

(B) Institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change, as amended,

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(5).

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 PCX. All submissions should refer to File No. SR-PCX-2001-33 and should be submitted by January 22, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁷

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45182; File No. SR-PHLX-2000-20]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 Thereo Relating to the Trading of Nasdaq Securities on the Floor of the Exchange

December 20, 2001.

I. Introduction

On November 16, 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"),¹ and rule 19b-4 thereunder,² a proposed rule change regarding the trading of Nasdaq securities on the floor of the Exchange, pursuant to unlisted trading privileges ("UTP"). Notice of the proposed rule change was published in the **Federal Register** on December 14, 2000.³ On May 14, 2001, the Exchange submitted Amendment No. 1 to the proposed rule change.⁴ Amendment No. 1 was published in the **Federal Register** on July 16, 2001.⁵ On June 22, 2001, the Exchange submitted Amendment No. 2 to the proposed rule change.⁶ The

Commission received two comment letters on the proposed rule change and a response from Phlx.⁷ This order approves the proposed rule change, as amended.

II. Description of the Proposal

The Phlx proposes to reinstate trading in certain over-the-counter ("OTC") securities, *i.e.*, Nasdaq National Market Securities ("Nasdaq/NM Securities"), on the floor of the Exchange, pursuant to UTP under section 12(f) of the Act.⁸ Therefore, Phlx seeks reinstatement of the pilot program and accompanying rules to permit the trading of Nasdaq/NM Securities on the Exchange pursuant to UTP ("Phlx OTC/UTP Pilot Program" or "Pilot").⁹ Generally, the Exchange proposes to make only minor changes to the Phlx rules that specifically govern trading of Nasdaq/NM Securities, such as to revise the term "Nasdaq/NM Securities." The Phlx has, however, proposed a new allocation procedure for Nasdaq/NM Securities. The Phlx has proposed to reinstate its Pilot to trade Nasdaq/NM Securities on a six-month pilot basis.

III. Summary of Comments

The Commission received two comments on the proposed rule change and a response from Phlx.¹⁰ One commenter, Knight, opposed the proposal. In its letter, Knight argued that the proposal should not be approved because: (1) Phlx has failed to demonstrate how permitting Phlx specialists to trade certain Nasdaq/NM Securities pursuant to the Pilot will maintain fair and orderly markets (as

required by section 12(f)(1)(E)(i) of the Act¹¹) (of particular concern to Knight is the fact that members of regional UTP exchanges will be held to the less stringent rules of regional exchanges than NASD market maker members); (2) members of regional UTP exchanges trading Nasdaq/NM Securities currently act in a manner inconsistent with the SEC Rule 11Ac1-1¹² (the "Firm Quote Rule"), by failing to execute transactions at prices that were displayed in the Nasdaq Montage; and (3) members of regional UTP exchanges trading Nasdaq/NM Securities currently act in a manner inconsistent with NASD's Locked/Crossed Market Rule¹³ and Trade-or-Move Rule.¹⁴

The Phlx responded to the Knight Letter. In its response letter, the Phlx countered each of Knight's arguments by contending that: (1) The SEC has already determined that permitting regional exchanges and their specialists and dealers to trade Nasdaq/NM Securities pursuant to the OTC/UTP Plan¹⁵ is consistent with fair and orderly markets; (2) the Knight Letter offers no evidence that members of regional UTP exchanges routinely violate the Firm Quote Rule; and (3) even through regional exchange specialists are not bound by the NASD's Locked/Crossed Market and Trade-or-Move Rules, regional specialists on a voluntary basis routinely comply with Trade-or-Move messages received by them pre-opening. Moreover, the Phlx noted that it does not intend to trade or quote during the pre-opening session.

The other commenter, Ashton, supported the proposal. Ashton operates the eVWAP trading system ("eVWAP") as a facility of the Phlx through its Universal Trading Technologies Corporation subsidiary. eVWAP is a pre-opening order matching session for the electronic execution of large-sized stock orders at a standardized volume weighted average price. Ashton noted that the Phlx soon will be filing amendments to Phlx Rule 237 (The eVWAP Morning Session) to expand eligibility of certain Nasdaq/NM

Division of Market Regulation, SEC, dated June 21, 2001 ("Amendment No. 2"). In Amendment No. 2, the Exchange corrected a citation to SEC "Rule 11Ac1-1" on page 22 of the amended Form 19b-4, deleted a reference to subsection "(ii)" on page 25 of the amended Form 19b-4, and changed all references to "issue" and "issues" in the proposed Rule 516 to read "security" and "securities," respectively.

⁷ See letters to Jonathan G. Katz, Secretary, SEC, from Michael T. Dorsey, Senior Vice President and General Counsel, Knight Trading Group, Inc., dated December 19, 2000 ("Knight Letter"); William W. Uchimoto, Executive Vice President and General Counsel, Ashton Technology Group, Inc., dated February 23, 2001 ("Ashton Letter"); and Edith Hallahan, Deputy General Counsel, Phlx, dated April 2, 2001 ("Phlx Letter").

⁸ 15 U.S.C. 781(f).

⁹ The Commission notes that the Phlx began trading Nasdaq/NM Securities pursuant to the Pilot in February 1993. See Securities Exchange Act Release No. 31672 (Dec. 30, 1992), 58 FR 3054 (Jan. 7, 1993). The effectiveness of the Pilot was extended four times before the Phlx decided to cease trading such securities pending reorganization of its OTC/UTP Pilot Program as a whole. See Securities Exchange Act Release No. 36087 (Aug. 10, 1995), 60 FR 42637, 42638 (Aug. 16, 1995). The Phlx OTC/UTP Pilot Program expired on February 12, 1996. *Id.*

¹⁰ See note 7 *supra*.

¹¹ 15 U.S.C. 781(f)(1)(E)(i).

¹² 17 CFR 240.11Ac1-1.

¹³ NASD Rule 4613(e).

¹⁴ NASD Rule 4613(b)(2).

¹⁵ The OTC/UTP Plan refers to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis. The participants of the OTC/UTP Plan are the American Stock Exchange LLC, the Chicago Stock Exchange, Inc., the Cincinnati Stock Exchange, Inc., the National Association of Securities Dealers, Inc., the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc.

⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 43692 (Dec. 8, 2000), 65 FR 78240.

⁴ See Form 19b-4 dated May 14, 2001 ("Amendment No. 1").

⁵ Securities Exchange Act Release No. 44533 (July 10, 2001), 66 FR 37083.

⁶ See letter from Diana Tenenbaum, Phlx, to Nancy J. Sanow, Senior Special Counsel [sic],