

provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2008-12 and should be submitted on or before July 3, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57936; File No. SR-Phlx-2008-36]

### Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to List and Trade Options on Full and Reduced Values of the Nasdaq-100 Index

June 6, 2008.

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 June 4, 2008, 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 and II below, which Items have been substantially prepared by the Exchange. The Exchange has designated the proposed rule change as a "non-controversial" rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposed rule change 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 Exchange, pursuant to Section 19(b)(1) of the Act<sup>5</sup> and Rule 19b-4 thereunder,<sup>6</sup> proposes to amend Phlx Rule 1079 (FLEX Index, Equity and Currency Options), Rule 1001A (Position Limits), and Rule 1101A (Terms of Options Contracts), to enable the Exchange to list and trade options on full and reduced values of the Nasdaq-100 Index. Phlx also proposes to list and trade FLEX options<sup>7</sup> and long-term options<sup>8</sup> on full and reduced values of the Index. The text of the proposed rule change is available at Phlx, the Commission's Public Reference Room, and <http://www.phlx.com/exchange/phlx-rule-fil.htm>.

### 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 Exchange included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange 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

In its filing with the Commission, 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. Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

<sup>5</sup> 15 U.S.C. 78s(b)(1).

<sup>6</sup> 17 CFR 240.19b-4.

<sup>7</sup> FLEX Options are flexible exchange-traded options contracts that overlie equity on index securities. FLEX Options provide investors with the ability to customize basic option features including size, expiration date, exercise style, and certain exercise prices. FLEX Options may have expiration dates within five years. See Phlx Rule 1079.

<sup>8</sup> Long term options are series of options having up to sixty months to expiration. They are structurally similar to shorter-term options and are sometimes known as Long-Term Entity Anticipation Securities (LEAPS). See Phlx Rule 1101A(b).

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

##### 1. Purpose

Phlx proposes to list and trade cash-settled, European-style, index options, including FLEX options and long-term options, on the full and reduced values of the Nasdaq 100 Index (the "Index"), a stock index calculated and maintained by Nasdaq.<sup>9</sup> Specifically, the Exchange proposes to list options based upon the full value of the Index ("Full-size Nasdaq 100 Index" or "NDX") as well as one-tenth of the value of the Nasdaq 100 Index ("Mini Nasdaq 100 Index" or "MNX"). The options on NDX and MNX listed on Phlx will be identical to those already listed on multiple exchanges.

Phlx is filing the proposed rule change because options on the Nasdaq 100 Index will not otherwise qualify for listing on the Exchange due to the component weightings of the Index. Specifically, Phlx Rule 1009A(d), which allows the listing of options on a broad-based index currently requires that no component of a broad-based index account for more than ten percent of the weight of the index.<sup>10</sup> Therefore, like the six other options exchanges that currently trade options on the Index, Phlx is seeking approval to list and trade options on the Index under the conditions and according to the standards set forth below.

This filing is based on a recently authorized Nasdaq proposal to list full and reduced value options on the Index.<sup>11</sup>

##### Index Design and Composition

The Index was launched in January 1985 and represents the largest non-financial domestic and international issues listed on Nasdaq based on market capitalization. The Index reflects companies across major industry groups, including computer hardware and software, telecommunications, retail/wholesale trade, and biotechnology.

The Index is calculated using a modified capitalization-weighted methodology. The value of the Index equals the aggregate value of the Index share weights of each of the component securities multiplied by each security's

<sup>9</sup> A description of the Index is available on Nasdaq's Web site at [http://dynamic.nasdaq.com/dynamic/nasdaq100\\_activity.stm](http://dynamic.nasdaq.com/dynamic/nasdaq100_activity.stm).

<sup>10</sup> See Securities Exchange Act Release No 54158 (July 17, 2006), 71 FR 41853, (July 24, 2006)(SR-Phlx-2006-17).

<sup>11</sup> See Security Exchange Act Release No 57654 (April 11, 2008), 73 FR 21003 (April 17, 2008)(SR-NASDAQ-2008-028).

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

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

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

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

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

respective official closing price on Nasdaq, divided by the Divisor. The Divisor serves the purpose of scaling such aggregate value (otherwise in the trillions) to a lower order of magnitude which is more desirable for Index reporting purposes. If trading in an Index security is halted while the market is open, the last Nasdaq traded price for that security is used for all index computations until trading resumes. If trading is halted before the market is open, the previous day's official closing price is used. Additionally, the Index ordinarily is calculated without regard to dividends on component securities. The modified capitalization-weighted methodology is expected to retain, in general, the economic attributes of capitalization weighting, while providing enhanced diversification. To accomplish this, Nasdaq reviews the composition of the Index quarterly and adjusts the weighting of Index components using a proprietary algorithm, if certain pre-established weight distribution requirements are not met.

Nasdaq has certain eligibility requirements for inclusion in the Index.<sup>12</sup> For example, to be eligible for inclusion in the Index, a component security must be exclusively listed on the Nasdaq Global Select or Nasdaq Global Market, or dually listed on a national securities exchange prior to January 1, 2004.<sup>13</sup> Only one class of security per issuer is considered for inclusion in the Index.

Additionally, the issuer of a component security cannot be a financial or investment company and cannot currently be involved in bankruptcy proceedings. Criteria for inclusion also require the average daily trading volume of a component security to be at least 200,000 shares on Nasdaq. If a component security is of a foreign issuer, based on its country of incorporation, it must have listed options or be eligible for listed-options trading. In addition, the issuer of a component security must not have entered into any definitive agreement or other arrangement which will likely result in the security no longer being Index eligible. An issuer of a component security also must not have annual

financial statements with an audit opinion that is currently withdrawn.

As of December 31, 2007, the following were characteristics of the Index:

- The total capitalization of all components of the Index was \$2.35 trillion;
- Regarding component capitalization, (a) The highest capitalization of a component was \$333.05 billion (Microsoft Corp.), (b) the lowest capitalization of a component was \$2.872 billion (Tellabs, Inc.), (c) the mean capitalization of the components was \$23.53 billion, and (d) the median capitalization of the components was \$8.71 billion;
- Regarding component price per share, (a) The highest price per share of a component was \$691.48 (Google Inc.), (b) the lowest price per share of a component was \$3.03 (Sirius Satellite Radio Inc.), (c) the mean price per share of the components was \$55.05, and (d) the median price per share of the components was \$35.10;
- Regarding component weightings, (a) The highest weighting of a component was 13.75% (Apple Inc.), (b) the lowest weighting of a component was 0.09% (Tellabs, Inc.), (c) the mean weighting of the components was 1.00%, (d) the median weighting of the components was 0.53%, and (e) the total weighting of the top five highest weighted components was 33.93% (Apple Inc., Microsoft Corporation, Google Inc., QUALCOMM Incorporated, and Research in Motion Limited.);
- Regarding component available shares, (a) The most available shares of a component was 8.11 billion shares (Microsoft Corp.), (b) the least available shares of a component was 22.68 million shares (Baidu.com, Inc.), (c) the mean available shares of the components was 577.60 million shares, and (d) the median available shares of the components was 211.69 million shares;
- Regarding the six-month average daily volumes of the components, (a) The highest six-month average daily volume of a component was 65.63 million shares (Microsoft Corp.), (b) the lowest six-month average daily volume of a component was 553,240 shares (Henry Schein, Inc.), (c) the mean six-month average daily volume of the components was 9.10 million shares, (d) the median six-month average daily volume of the components was 3.37 million shares, (e) the average of six-month average daily volumes of the five most heavily traded components was 285.37 million shares (Microsoft Corp., Intel Corp., Sun Microsystems, Inc., Cisco Systems, Inc., and Level 3

Communications, Inc.), and (f) 100% of the components had a six-month average daily volume of at least 50,000; and

- Regarding option eligibility, (a) 99.3% of the components were options eligible, as measured by weighting, and (b) 96.0% of the components were options eligible, as measured by number.

#### Index Calculation and Index Maintenance

In recent years, the value of the Full-size Nasdaq 100 Index has increased significantly, such that the value of the Index stood at 2084.93 as of December 31, 2007. As a result, the premium for the Full-size Nasdaq 100 Index options also has increased. The Exchange believes that this has caused Full-size Nasdaq 100 Index options to trade at a level that may be uncomfortably high for retail investors. The Exchange believes that listing options on reduced values will attract a greater source of customer business than if the options were based only on the full value of the Index. The Exchange further believes that listing options on reduced values will provide an opportunity for investors to hedge, or speculate on, the market risk associated with the stocks comprising the Index. Additionally, by reducing the values of the Index, investors will be able to use this trading vehicle while extending a smaller outlay of capital. The Exchange believes that this should attract additional investors and, in turn, create a more active and liquid trading environment.<sup>14</sup>

The Full-size Nasdaq 100 Index and the Mini Nasdaq 100 Index levels are calculated continuously, using the last sale price for each component stock in the Index, and are disseminated every 15 seconds throughout the trading day.<sup>15</sup> The Full-size Nasdaq 100 Index level equals the current market value of component stocks multiplied by 125 and then divided by the stocks' market value of the adjusted base period. The adjusted base period market value is determined by multiplying the current

<sup>14</sup> Options trading on MNX have generated considerable interest from investors, as measured by its robust trading volume on multiple exchanges in the last quarter of 2007 (2,181,126 contracts total).

<sup>15</sup> Full-size Nasdaq 100 Index and Mini Nasdaq 100 Index levels are disseminated through the Nasdaq Index Dissemination Services ("NIDS") during normal Nasdaq trading hours (9:30 a.m. to 4 p.m. ET). The Index is calculated using Nasdaq prices (not consolidated) during the day and the official closing price for the close. The closing value of the Index may change until 5:15 p.m. ET due to corrections to the NOCP of the component securities. In addition, the Index is published daily on Nasdaq's Web site and through major quotation vendors such as Reuters and Thomson's ILX.

<sup>12</sup> The initial eligibility criteria and continued eligibility criteria are available on Nasdaq's Web site at [http://dynamic.nasdaq.com/dynamic/nasdaq100\\_activity.stm](http://dynamic.nasdaq.com/dynamic/nasdaq100_activity.stm).

<sup>13</sup> In the case of spin-offs, the operating history of the spin-off will be considered by Nasdaq. Additionally, if a component security will otherwise qualify to be in the top 25% of securities included in the Index by market capitalization for the six prior consecutive months, it will be eligible if it had been listed for one year.

market value after adjustments, times the previous base period market value and then dividing that result by the current market value before adjustments. To calculate the value of the Mini Nasdaq 100 Index, the full value of the Index is divided by ten. To maintain continuity for the Index's value, the divisor is adjusted periodically to reflect events such as changes in the number of common shares outstanding for component stocks, company additions or deletions, corporate restructurings, or other capitalization changes.

The settlement values for purposes of settling both Full-size Nasdaq 100 Index ("Full-size Settlement Value") and Mini Nasdaq 100 Index ("Mini Settlement Value") are calculated based on a volume-weighted average of prices reported in the first five minutes of trading for each of the component securities on the last business day before the expiration date ("Settlement Day").<sup>16</sup> The Settlement Day is normally the Friday preceding "Expiration Saturday."<sup>17</sup> If a component security in the Index does not trade on Settlement Day, the closing price from the previous trading day will be used to calculate both the Full-size Settlement Value and Mini Settlement Value.<sup>18</sup> Accordingly, trading in options on the Index will normally cease on the Thursday preceding an Expiration Saturday. Nasdaq monitors and maintains the Index. Nasdaq is responsible for making all necessary adjustments to the Index to reflect component deletions; share changes; stock splits; stock dividends; stock price adjustments due to restructuring, mergers, or spin-offs involving the underlying components; and other corporate actions. Some corporate actions, such as stock splits and stock dividends, require simple changes to the available shares outstanding and the stock prices of the underlying components.

The component securities are evaluated on an annual basis, except under extraordinary circumstances which may result in an interim evaluation, as follows: Securities listed on Nasdaq that meet its eligibility criteria are ranked by market value using closing prices as of the end of October and publicly available total shares outstanding as of the end of November. Eligible component

securities which are already in the Index and ranked in the top 100 (based on market value) are retained in the Index. Component securities that are ranked from 101 to 125 are also retained, provided that those securities were ranked in the top 100 eligible securities as of the previous ranking review or have been added to the Index subsequent to the previous ranking review. Securities not meeting such criteria are replaced. The replacement securities chosen are those Index-eligible securities not currently in the Index that have the largest market capitalization.

Generally, the list of annual additions and deletions to the Index is publicly announced in early December, and changes to the Index are made effective after the close of trading on the third Friday in December. Moreover, if at any time during the year a component security is determined by Nasdaq to become ineligible for continued inclusion in the Index based on the continued eligibility criteria, that component security will be replaced with the largest market capitalization component not currently in the Index that met the eligibility criteria described earlier.

Phlx will monitor the Index on a quarterly basis, and will not list any additional series for trading and will limit all transactions in such options to closing transactions only for the purpose of maintaining a fair and orderly market and protecting investors if: (i) The number of securities in the Index drops by one-third or more; (ii) 10% or more of the weight of the Index is represented by component securities having a market value of less than \$75 million; (iii) less than 80% of the weight of the Index is represented by component securities that are eligible for options trading pursuant to Phlx Rules 1000A *et seq.*; (iv) 10% or more of the weight of the Index is represented by component securities trading less than 20,000 shares per day; or (v) the largest component security accounts for more than 25% of the weight of the Index or the largest five components in the aggregate account for more than 50% of the weight of the Index.

Phlx represents that, if the Index ceases to be maintained or calculated, or if the Index values are not disseminated every 15 seconds by a widely available source, it will not list any additional series for trading and will limit all transactions in such options to closing transactions only for the purpose of maintaining a fair and orderly market and protecting investors.

## Contract Specifications

The proposed contract specifications are identical to the contract specifications of NDX and MNX options that are currently listed on other exchanges. The Index is a broad-based index. Options on the Nasdaq 100 Index are European-style and A.M. cash-settled.<sup>19</sup> The Exchange's trading hours for index options (9:30 a.m. to 4:15 p.m. ET), will apply to options on the Nasdaq 100 Index.<sup>20</sup> Exchange rules that are applicable to the trading of options on broad-based indexes will apply to both NDX and MNX.<sup>21</sup> The trading of NDX and MNX options will be subject to, among others, Exchange rules governing margin requirements and trading halt procedures for index options.

The Exchange proposes to establish that there will be no position limits for any NDX options and any MNX options.<sup>22</sup> The Full-size Nasdaq 100 Index contracts will be aggregated with the Mini Nasdaq 100 Index contracts, where ten Mini Nasdaq 100 Index contracts equal one Full-size Nasdaq 100 Index contract.<sup>23</sup> Phlx will set strike price intervals for Mini Nasdaq 100 Index contracts and Full-size Nasdaq 100 Index contract that will be similar to the strike price intervals that are already being used by multiple exchanges that list these options.<sup>24</sup> The minimum increment size for series trading below \$3 is \$0.05, and for series trading at or above \$3 is \$0.10.<sup>25</sup> The Exchange's margin rules will be applicable.<sup>26</sup> The Exchange will list options on both the Full-size Nasdaq 100 Index and the Mini Nasdaq 100 Index in up to four consecutive expiration months plus up to three successive expiration months in the March cycle.<sup>27</sup> The Exchange intends to list the same NDX 100 Index options that are already listed by multiple other options exchanges. The trading of long-term Nasdaq 100 Index options will be subject to the same rules that govern the trading of all the Exchange's index options, including sales practice rules,

<sup>19</sup> See *supra* note 5.

<sup>20</sup> See Commentary .01 to Phlx Rule 1101A.

<sup>21</sup> See Phlx Rules 1000A *et seq.*

<sup>22</sup> See proposed Phlx Rules 1001A(a) 1079(d). The Exchange's proposed rule change establishing that there are no position limits on NDX and MNX is identical to that of other options exchanges. See for example CBOE Rules 24.4, 24A.7, and 24B.7.

<sup>23</sup> See Phlx Rule 1001A(e).

<sup>24</sup> See Phlx Rule 1101A. Based on the current strike price intervals in use for options on the Mini Nasdaq 100 Index and the Full-size Nasdaq 100 Index, Phlx plans to set MNX strike price intervals of \$2.50 or \$5.00 depending on the price of the underlying; and NDX strike price intervals of \$5.00.

<sup>25</sup> See Phlx Rule 1034(a).

<sup>26</sup> See Phlx Rule 721 *et seq.*

<sup>27</sup> See Phlx Rule 1001A(b).

<sup>16</sup> The aggregate exercise value of the option contract is calculated by multiplying the Index value by the Index multiplier, which is 100.

<sup>17</sup> For any given expiration month, options on the Nasdaq 100 Index will expire on the third Saturday of the month.

<sup>18</sup> Full-size Settlement Values and Mini Settlement Values are disseminated by Nasdaq.

margin requirements, and trading rules.<sup>28</sup>

#### Surveillance and Capacity

The Exchange represents that it has an adequate surveillance program in place for options traded on the Index and intends to apply those same program procedures that it applies to the Exchange's other index options.

Additionally, the Exchange is a member of the Intermarket Surveillance Group ("ISG") under the Intermarket Surveillance Group Agreement, dated June 20, 1994.<sup>29</sup> The ISG members work together to coordinate surveillance and investigative information sharing in the stock and options markets. In addition, the major futures exchanges are affiliated members of the ISG, which allows for the sharing of surveillance information for potential intermarket trading abuses.

The Exchange represents that it has the necessary systems capacity to support new options series that will result from the introduction of NDX, MNX, NDX LEAPS, and MNX LEAPS.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>30</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>31</sup> in particular, in that it is designed 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, by amending Phlx rules so that they are similar to the rules of other options exchanges, thereby enabling the Exchange to immediately list and trade full and reduced-size options on the NDX-100 Index.

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

The Exchange does not believe that the proposed rule change 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

No written comments were solicited or received.

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

Because the foregoing rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>32</sup> and Rule 19b-4(f)(6) thereunder.<sup>33</sup>

A proposed rule change filed under 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.<sup>34</sup> However, Rule 19b-4(f)(6)(iii)<sup>35</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow Phlx to immediately list and trade NDX and MNX options, which are widely traded on multiple markets.

For this reason, the Commission designates the proposed rule change to be operative upon filing with the Commission.<sup>36</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.

<sup>32</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>33</sup> 17 CFR 240.19b-4(f)(6).

<sup>34</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this notice requirement.

<sup>35</sup> *Id.*

<sup>36</sup> For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

#### 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. Comments may be submitted by any of the following methods:

##### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2008-36 on the subject line.

##### Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2008-36. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2008-36 and should be submitted on or before July 3, 2008.

<sup>28</sup> The Exchange proposes to conform its rules to that of other Exchanges to accommodate the trading of reduced value long term options at \$2.50 intervals. See proposed Phlx Rule 1101A(a)(xxiv).

<sup>29</sup> A list of the current members and affiliate members of ISG can be found at <http://www.isgportal.com>.

<sup>30</sup> 15 U.S.C. 78f(b).

<sup>31</sup> 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>37</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2008-0076]

#### Hours of Service of Drivers: United States Department of Energy (DOE); Application for Exemption

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of application for exemption; request for comments.

**SUMMARY:** FMCSA has received an application from the U.S. Department of Energy (DOE) for an exemption from certain provisions of the Agency's hours-of-service (HOS) regulations. DOE proposes that its contract motor carriers and their employee-drivers engaged in the transportation of transuranic waste (TRU) be granted an exemption from the HOS rules pertaining to use of a sleeper berth (SB). Current HOS rules require that all SB rest regimens include, in part, the regular use of a SB period of at least 8 hours—combined with a separate period of at least 2 hours, either in the SB, off-duty or some combination of both—to gain the equivalent of at least 10 consecutive hours off-duty. DOE proposes that its contract drivers be allowed to take the equivalent of 10 consecutive hours off duty by splitting SB time into two periods, provided neither of the two periods is less than 2 hours. DOE asserts that if its request for exemption is granted, the level of safety of its TRU operations would be equivalent to, or greater than, the level of safety that would be obtained by complying with the current HOS regulations. FMCSA requests public comment on DOE's application for exemption.

**DATES:** Comments must be submitted on or before July 14, 2008.

**ADDRESSES:** You may submit comments identified by Federal Docket Management System Number FMCSA-2008-0076 by any of the following methods:

- **Web Site:** <http://www.regulations.gov>. Follow the instructions for submitting comments on the Federal electronic docket site.

- **Fax:** 1-202-493-2251.

- **Mail:** Docket Management Facility, U.S. Department of Transportation, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

- **Hand Delivery:** Ground Floor, Room W12-140, DOT Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays.

**Instructions:** All submissions must include the Agency name and docket number. For detailed instructions on submitting comments and additional information on the exemption process, see the Public Participation heading below. Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act heading below.

**Docket:** For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> at any time or to the ground floor, room W12-140, DOT Building, New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays.

**Privacy Act:** Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476) or you may visit <http://www.regulations.gov>.

**Public participation:** The <http://www.regulations.gov> Web site is generally available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the "help" section of the <http://www.regulations.gov> Web site and also at the DOT's <http://docketsinfo.dot.gov> Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments online.

**FOR FURTHER INFORMATION CONTACT:** Mr. Richard Clemente, FMCSA Driver and Carrier Operations Division, Office of Bus and Truck Standards and Operations. **Telephone:** 202-366-4325. **E-mail:** [MCPSPD@dot.gov](mailto:MCPSPD@dot.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 4007 of the Transportation Equity Act for the 21st Century (Pub. L.

105-178, 112 Stat. 107, June 9, 1998) amended 49 U.S.C. 31315 and 31136(e) to provide authority to grant exemptions from motor carrier safety regulations. Under its regulations, FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews the safety analyses and the public comments, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reason for denying or, in the alternative, the specific person or class of persons receiving the exemption, and the regulatory provision or provisions from which the exemption is granted. The notice must also specify the effective period of the exemption (up to 2 years), and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

#### Request for Exemption

U.S. Department of Energy (DOE) contractors provide long-haul transportation of transuranic disposable waste (TRU), a hazardous material (HM) under Federal regulations, to and from a DOE repository in Carlsbad, New Mexico. The contractors transport this nuclear waste by means of commercial motor vehicles (CMVs) equipped with cargo tanks. These operations are time sensitive and involve a high security risk. The contractors conduct approximately 30 round-trips a week, each between 2,500 and 3,500 miles. Alternating between driving and sleeper-berth (SB), the two-driver teams normally complete a trip within 3 to 4 days.

DOE requests an exemption from the current regulations for these TRU waste long-haul operations to eliminate the requirement that SB regimens include a period of at least 8 but less than 10 consecutive hours in the SB (49 CFR 395.1(g)(1)(ii)(A)(1)). DOE proposes that these commercial motor vehicle (CMV) drivers transporting TRU waste shipments be allowed to split SB time into two periods, provided neither of the two periods is less than 2 hours in length. The TRU waste shipments require a team of two drivers and the use of the SB. DOE believes it is

<sup>37</sup> 17 CFR 200.30-3(a)(12).