Proposed Rule Change by Philadelphia Stock Exchange

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

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Pilot
- Extension of Time Period for Commission Action
- Date Expires

**Description**

Provide a brief description of the proposed rule change (limit 250 characters).

"Phlx proposes to interpret its rules relating to certain orders marked sell short entered before the opening."

**Contact Information**

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

**Signature**

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date: 03/22/2006

By: John Dayton  
Director and Counsel

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.
The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

### Exhibit 1 - Notice of Proposed Rule Change

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3).

### Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

### Exhibit 3 - Form, Report, or Questionnaire

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

### Exhibit 4 - Marked Copies

The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

### Exhibit 5 - Proposed Rule Text

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

### Partial Amendment

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission’s permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.
1. **Text of the Proposed Rule Change**

The Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") and Rule 19b-4 thereunder, proposes to interpret its rules to make certain market and limit orders in Short Sale Exempt Securities received prior the opening pursuant to Phlx Rule 229, Supplementary Material .06 and .10(a)(iv), eligible for automatic execution, even though such orders are marked sell short.

A notice of the proposed rule change for publication in the Federal Register is attached hereto as Exhibit 1. There is no text change as such.

2. **Procedures of the Self-Regulatory Organization**

The Executive Committee, pursuant to delegated authority, approved the proposal for filing with the Securities and Exchange Commission ("SEC" or "Commission") on March 3, 2005.

Questions and comments on the proposed rule change may be directed to John Dayton, Director and Counsel, at (215) 496-5162, or Edith Hallahan, Senior Vice President and Deputy General Counsel, at (215) 496-5179.

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3 The Commission’s Division of Market Regulation (the “Division”) issued two no-action letters (the “Two No-Action Letters”) regarding broker-dealer marking requirements under Rule 200(g) of Regulation SHO. See Letter from James A. Brigagliano, Assistant Director, Securities and Exchange Commission, to Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association, dated January 3, 2005 and letter from James A. Brigagliano, Assistant Director, Commission, to Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association, dated April 15, 2005. As used in this proposed rule change, Short Sale Exempt Securities means those securities traded on the Phlx and described in one of the Two No-Action Letters.
3. **Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

   a. **Purpose**

   The purpose of the proposed rule change is to treat orders received over PACE\(^4\) prior to the opening in a manner consistent with the treatment expected by the member organizations entering the orders. Pursuant to Phlx Rule 229, Supplementary Material .06 and .10(a)(iv), certain market and limit orders received prior to the opening are eligible for automatic execution at the opening price of the New York market, unless, among other things, those orders are marked sell short.\(^5\) The reason for not automatically executing orders marked sell short is to prevent a possible violation of the tick test in Rule 10a-1 under the Act\(^6\) if an order market sell short were executed on an impermissible tick. However, in 2005, the Division issued Two No-Action Letters, which allowed broker-dealers, such as Phlx member organizations, to mark sell short orders in Short Sale Exempt Securities that are not subject to any other exemption as “sell short” instead of “sell short exempt” if those orders were sent to exchanges which, among other things, “have instituted procedures to ‘mask’ the short sale character of the transaction so they are executed as short exempt.”\(^7\) The Phlx has implemented such procedures to mask the short sale character of transactions in Short Sale Exempt Securities.

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\(^4\) PACE is the Exchange’s automated order routing, delivery, execution and reporting system for equities. See Phlx Rule 229.


\(^6\) 17 CFR 240.10a-1.

\(^7\) See the Two No-Action Letters.
Transactions so they are executed as short exempt. Therefore, in reliance on the Two No-Actions Letters, Phlx member organizations can mark such orders “sell short”.

Accordingly, in accordance with the Division’s Two No-Action Letters, eligible sell short orders received prior to the opening in Short Sale Exempt Securities could now, by law, be automatically executed on the Phlx without applying the tick test. However, pursuant to Phlx’s own rules, Phlx Rule 229, Supplementary Material .06 and .10(a)(iv), orders market “sell short exempt” are eligible for automatic execution and orders marked “sell short” are not.

The Phlx now proposes to interpret Phlx Rule 229, Supplementary Material .06 and .10(a)(iv) to consider orders in Short Sale Exempt Securities that are marked sell short as if they were marked sell short exempt. Therefore such orders in Short Sale Exempt Securities that are marked sell short, if otherwise eligible, would execute automatically, pursuant to Phlx Rule 229, Supplementary Material .06 and .10(a)(iv). The Phlx believes that this interpretation conforms to the intention of member organizations entering orders marked sell short in Short Sale Exempt Securities, because, relying on the Two No-Action Letters, such member organization would expect such order to be treated as if it were, in fact, marked sell short exempt.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act\(^8\) in general, and furthers the objectives of Section 6(b)(5) of the Act\(^9\) 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 treating orders entered by member
organizations in a manner consistent with their expectations.

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

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

5. **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.

6. **Extension of Time Period for Commission Action**

   The Exchange does not consent to an extension of the time period for
Commission action.

7. **Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated
Effectiveness Pursuant to Section 19(b)(2)**

   The foregoing proposed rule change has been designated as constituting a stated
policy, practice, or interpretation with respect to the meaning, administration, or
enforcement of an existing rule pursuant to Section 19(b)(3)(A)(i) of the Act\(^\text{10}\) and Rule
19b-4(f)(1)\(^\text{11}\) thereunder. Accordingly, the proposal will take effect upon filing with the
Commission. At any time within 60 days of the filing of the 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.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

1. Notice of proposed rule for publication in the Federal Register.
Exhibit 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. ; File No. SR-Phlx-2006-19)

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Orders Marked Sell Short Entered Before the Opening

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")\(^1\), and Rule 19b-4\(^2\) thereunder, notice is hereby given that on ______________________ 2006, 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 Phlx. 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, pursuant to Section 19(b)(1) of the Act\(^3\) and Rule 19b-4 thereunder,\(^4\) proposes to interpret its rules to make certain market and limit orders in Short Sale Exempt Securities\(^5\) received prior the opening pursuant to Phlx Rule 229, Supplementary

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\(^5\) The Commission’s Division of Market Regulation (the “Division”) issued two no-action letters (the “Two No-Action Letters”) regarding broker-dealer marking requirements under Rule 200(g) of Regulation SHO. See Letter from James A. Brigagliano, Assistant Director, Securities and Exchange Commission, to Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association, dated January 3, 2005 and letter from James A. Brigagliano, Assistant Director, Commission, to Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association, dated April 15, 2005. As used in this
Material .06 and .10(a)(iv), eligible for automatic execution, even though such orders are marked sell short.

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

1. Purpose

The purpose of the proposed rule change is to treat orders received over PACE\(^6\) prior to the opening in a manner consistent with the treatment expected by the member organizations entering the orders. Pursuant to Phlx Rule 229, Supplementary Material .06 and .10(a)(iv), certain market and limit orders received prior to the opening are eligible for automatic execution at the opening price of the New York market, unless, among other things, those orders are marked sell short.\(^7\) The reason for not automatically executing orders marked sell short is to prevent a possible violation of the tick test in

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\(^6\) PACE is the Exchange’s automated order routing, delivery, execution and reporting system for equities. See Phlx Rule 229.

Rule 10a-1 under the Act\(^8\) if an order market sell short were executed on an
impermissible tick. However, in 2005, the Division issued Two No-Action Letters,
which allowed broker-dealers, such as Phlx member organizations, to mark sell short
orders in Short Sale Exempt Securities that are not subject to any other exemption as “sell
short” instead of “sell short exempt” if those orders were sent to exchanges which, among
other things, “have instituted procedures to ‘mask’ the short sale character of the
transaction so they are executed as short exempt.”\(^9\) The Phlx has implemented such
procedures to mask the short sale character of transactions in Short Sale Exempt
Transactions so they are executed as short exempt. Therefore, in reliance on the Two
No-Actions Letters, Phlx member organizations can mark such orders “sell short”.

Accordingly, in accordance with the Division’s Two No-Action Letters, eligible
sell short orders received prior to the opening in Short Sale Exempt Securities could now,
by law, be automatically executed on the Phlx without applying the tick test. However,
pursuant to Phlx’s own rules, Phlx Rule 229, Supplementary Material .06 and .10(a)(iv),
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The Phlx now proposes to interpret Phlx Rule 229, Supplementary Material .06
and .10(a)(iv) to consider orders in Short Sale Exempt Securities that are marked sell
short as if they were marked sell short exempt. Therefore such orders in Short Sale
Exempt Securities that are marked sell short, if otherwise eligible, would execute
automatically, pursuant to Phlx Rule 229, Supplementary Material .06 and .10(a)(iv).

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\(^8\) 17 CFR 240.10a-1.

\(^9\) See the Two No-Action Letters.
The Phlx believes that this interpretation conforms to the intention of member organizations entering orders marked sell short in Short Sale Exempt Securities, because, relying on the Two No-Action Letters, such member organization would expect such order to be treated as if it were, in fact, marked sell short exempt.

2. **Statutory Basis**

The Exchange believes that its proposal is consistent with Section 6(b) of the Act in general, and furthers the objectives of Section 6(b)(5) of the Act 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 treating orders entered by member organizations in a manner consistent with their expectations.

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 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 either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and paragraph (f)(1) of Rule 19b-4 thereunder. At any time within 60 days of

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the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether 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. Please include File Number SR-Phlx-2006-19 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-Phlx-2006-19. 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. Copies of the filing also will be available for inspection and copying at the principal office of the Phlx.

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-2006-19 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Nancy M. Morris
Secretary