

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

In its filing with the Commission, Nasdaq 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. Nasdaq 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 amend NASD Rule 4330(f) (the "Rule") which provides, in pertinent part, that a Nasdaq issuer must comply with all applicable initial inclusion requirements under Nasdaq rules in the event that the issuer enters into a merger, consolidation, or other type of acquisition with a non-Nasdaq entity, which results in a change of control and either a change in business or a change in the financial structure of the Nasdaq issuer.

Nasdaq originally adopted the Rule in 1993 to address the trend of non-Nasdaq entities seeking a "backdoor listing" on Nasdaq through a business combination involving a Nasdaq issuer.⁵ In these combinations, a non-Nasdaq entity purchased a Nasdaq issuer in a transaction that resulted in the non-Nasdaq entity obtaining a Nasdaq listing without qualifying for initial listing or being subject to the background checks and scrutiny normally applied to issuers seeking initial listing.

Some issuers and their counsel have expressed uncertainty regarding the exact circumstances under which the Rule is applicable. Therefore, Nasdaq proposes to amend the Rule to more clearly define that it is intended to apply to business combinations between a Nasdaq issuer and a non-Nasdaq entity in which there is a change of control of the Nasdaq issuer⁶ and the potential for the non-Nasdaq entity to acquire a Nasdaq listing (for purposes of this rule, such a transaction is referred to as a "Reverse Merger"). To provide further clarification, the proposed Rule would also set forth a list of non-exclusive

factors to be considered when determining whether a Reverse Merger has occurred. These factors include changes in the management, board of directors, voting power, ownership, and financial structure of the Nasdaq issuer. The nature of the businesses and the relative size of the Nasdaq issuer and non-Nasdaq entity would also constitute additional factors to be considered. Nasdaq believes that these proposed amendments will clarify the Rule for issuers while continuing to prevent "backdoor listings" on Nasdaq.

Nasdaq also proposes to make conforming changes to IM-4300, Interpretive Material Regarding Future Priced Securities.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with Section 15A(b)(6)⁷ of the Act, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest. As noted above, the proposed rule change is aimed at clarifying NASD Rule 4330(f), which prevents non-Nasdaq entities from obtaining a "backdoor listing" on Nasdaq through a business combination involving a Nasdaq issuer.

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

Nasdaq 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.

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 with respect to the proposed rule change.

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 self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 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 File No. SR-NASD-01-01 and should be submitted by February 28, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁸

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43911; Filed No. SR-PCX-00-46]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Relating to Prohibition of Harassment

January 31, 2001.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 13, 2000, 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

⁵ See Securities Exchange Act Release No. 32264 (May 4, 1993), 58 FR 27760 (May 11, 1993) (ordering approving File No. SR-NASD-93-07).

⁶ It is not necessary to obtain a majority interest in order for a change of control to occur.

⁷ 15 U.S.C. 78o-3(b)(6).

⁸ 17 CFR 200.30-3(a)(12)

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

prepared by the Exchange. The proposed rule change has been filed by the Phlx as a "non-controversial" rule change under Rule 19b-4(f)(6) of the Act.³ 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 PCX proposes to adopt a new rule to prohibit harassment, intimidation, "refusal to deal" and retaliation in the option listing process and to prohibit harassment of another for "seeking to act competitively."

The text of the proposed rule change is available at the Office of the Secretary, PCX and at the Commission.

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

Currently PCX Rule 6.2(b) sets forth prohibitions on certain manner of conduct on the floor of the Exchange. Under this rule, a member will be sanctioned if two Floor Officials or the Options Floor Trading Committee make the determination that the member has acted in a manner that impairs the maintenance of a fair and orderly market or the member's conduct impairs public confidence in the operations of the Exchange. The purpose of the proposed rule is to broaden the scope of Rule 6.2 to prohibit harassment. The proposed rule seeks to prevent harassment and intimidation of members who act or seek to act competitively.

The proposed rule would make it "conduct inconsistent with just and equitable principles of trade for any member, member organization or associated person of a member or member organization to engage, directly

or indirectly, in any conduct that threatens, harasses, intimidates, constitutes a 'refusal to deal' or retaliate against any other member . . ." because such member: (1) Has made a proposal to any exchange or other market to list or trade any option issue; (2) has advocated or made proposals concerning the listing or trading of an option issue on any exchange or other market; (3) has commenced making a market in or trading any option issue on any exchange or other market; (4) seeks to increase the capacity of any options exchange or the options industry to disseminate quote or trade data; (5) seeks to introduce new option products; or (6) seeks to act competitively.

The PCX believes that the prohibited conduct discussed above is inconsistent with the obligation of all members to their customers, the Exchange, and the public interest in the operation of fair and efficient options markets. The PCX will strictly enforce the requirements of the proposed rule. Any violations of this rule will be referred to the Exchange's Enforcement Division for appropriate disciplinary action.⁴

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,⁵ in general, and furthers the objectives of section 6(b)(5),⁶ in particular, in that it is designed to promote just and equitable principles of trade, prevent fraudulent and manipulative acts and practices, and protect investors and the public interest by prohibiting harassment in the listing of options.

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.

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

Written comments were neither solicited nor received.

⁴ The PCX will revise its Employee Handbook and Statements of Fiduciary Responsibilities for Governors and Committee Members to include the same prohibitions on harassment. The Exchange must file with the Commission a proposed rule change incorporating these additional changes. Telephone call from Geoffrey Pemble, Attorney, Division of Market Regulation, SEC, to Hassan Abedi, Attorney, Regulatory Policy, PCX (January 30, 2001).

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(5).

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

The proposed rule change has been filed by the Exchange as "non-controversial" rule change pursuant to section 19(b)(3)(A) of the Act⁷ and Rule 19b-4(f)(6) thereunder.⁸ Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest, (2) does not impose any significant burden on competition, and (3) by its terms does not 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 Act⁹ and Rule 19b-4(f)(6)¹⁰ thereunder.¹¹ 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.

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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to the File No. SR-PCX-00-46 and should be submitted by February 28, 2001.

⁷ 15 U.S.C. 78s(b)(3)(A).

⁸ 17 CFR 240.19b-4(f)(6).

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f)(6).

¹¹ The Exchange provide the Commission with the five business day notice required by Rule 19b-4(f)(6) of the Act.

³ 17 CFR 240.19b-4(f)(6).

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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43912; File No. SR-Phlx-00-91]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Philadelphia Stock Exchange, Inc., Relating to Index Fund Shares

January 31, 2001.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 4, 2000, 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 and III below, which Items have been prepared by the Phlx. On January 23, 2001, the Phlx filed an amendment to the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons and to approve the proposal on an accelerated basis.

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

The Phlx proposes to adopt listing standards and trading rules for Index Fund Shares, including generic listing standards, which would permit the Phlx to trade a series of Index Fund Shares pursuant to Rule 19b-4(e) under the Act. The text of the proposed rule change is available at the Phlx or the Commission.

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. The text of these statements may be examined at the places specified in Item III 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

I. Purpose

a. *Listing Requirements for Index Fund Shares.* The Phlx proposes to adopt new listing and delisting requirements to accommodate the trading of Index Fund Shares, securities issued by an open-end management investment company ("Fund") that seek to provide investment results that correspond generally to the price and yield performance of a specified underlying index ("Index Fund Shares"). The listing standards will permit the Exchange to trade Index Fund Shares either by listing or pursuant to unlisted trading privileges ("UTP").

Index Fund Shares will be issued by an entity registered with the Commission as an open-end management investment company, and which may be organized as a series fund providing for the creation of separate series of securities, each with a portfolio consisting of some or all of the component securities of a specified securities index. Issuances of Index Fund Shares by a Fund will be made only in minimum size aggregations or multiples thereof ("Creation Units"). The size of the applicable Creation Unit size aggregation will be set forth in the Fund's prospectus, and will vary from one series of Index Fund Shares to another, but generally will be of substantial size (e.g., value in excess of \$450,000 per Creation Unit). It is expected that a Fund will issue and sell Index Fund Shares through a principal underwriter on a continuous basis at the net asset value per share next determined after an order to purchase Index Fund Shares in Creation Unit size aggregations is received in proper form. Index Fund Shares will be traded on the Exchange like other equity securities, and Phlx equity trading rules will apply to the trading of Index Fund Shares.

The Phlx expects that Creation Unit size aggregations of Index Fund Shares generally will be issued in exchange for the "in kind" deposit of a specified portfolio of securities, together with a cash payment representing, in part, the amount of dividends accrued up to the time of issuance. The Phlx anticipates that such deposits will be made primarily by institutional investors, arbitrageurs, and the Phlx specialist. Redemption of Index Fund Shares generally will be made "in kind," with a portfolio of securities and or cash exchanged for Index Fund Shares that have been tendered for redemption. Issuances or redemptions also could occur for cash under specified circumstances (e.g., if it is not possible to effect delivery of securities underlying the specific series in a particular foreign country) and at other times in the discretion of the Fund.

The Phlx expects that a Fund will make available on a daily basis a list of the names and the required number of shares of each of the securities to be deposited in connection with the issuance of Index Fund Shares of a particular series in Creation Unit size aggregations, as well as information relating to the required cash payment representing, in part, the amount of accrued dividends.

A Fund may make periodic distributions of dividends from net investment income, including net foreign currency gains, if any, in an amount approximately equal to accumulated dividends on securities held by the Fund during the applicable period, net of expenses and liabilities for such period. A Fund may also distribute its capital gains, if any. The Exchange notes that the trading prices of Index Fund Shares may differ in varying degrees from their daily NAV and can be affected by market forces such as supply and demand, economic conditions and other factors.⁴

Index Fund Shares will be registered in book entry form through The Depository Trust Company ("DTC"), which means no stock certificates will be issued. Trading in Index Fund Shares on the Exchange may be effected until either 4:00 p.m. or 4:15 p.m. each business day.

Criteria for Initial and Continued Listing. The Phlx believes that the listing criteria proposed in its new rule are generally consistent with the listing standards for Index Fund Shares currently used by the American Stock

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Letter from Carla Behnfeldt, Director, New Product Development Group, Phlx, to Nancy Sanow, Esq., Assistant Director, Division of Market Regulation ("Division"), Commission, dated January 22, 2001 ("Amendment No. 1"). Amendment No. 1 adds language to the rule text and the purpose section of the filing that clarifies Phlx's prospectus delivery requirements under the Securities Act of 1933. In addition, Amendment No. 1 adds representations by the Exchange in the purpose section of the filing regarding factors affecting (1) the trading prices of Index Fund Shares, (2) the minimum number of creation units, and (3) minimum trading variations.

⁴ See Amendment No. 1, *supra* note 3.