

must comply with three criteria to maintain its status as a PTS.<sup>9</sup> One such criteria is that, for each security traded in the PTS, the PTS cannot trade more than one percent of the average daily consolidated trading volume of any such security, during at least two of the last four consecutive calendar months. Nasdaq represents that Primex exceeded this threshold for many securities. Therefore, Nasdaq filed a proposed rule change seeking permanent approval of Primex.<sup>10</sup> Nasdaq also filed a proposed rule change to continue operating the System for up to six months while the Commission considered granting permanent approval.<sup>11</sup> This six-month period expires on October 31, 2002. The Commission is still considering Nasdaq's filing seeking permanent approval of Primex. Accordingly, Nasdaq is filing this proposed rule change to continue operating Primex as a PTS until November 30, 2002, or until the Commission grants permanent approval, whichever period is shorter. Primex continues to operate in the manner described in the Form PILOT filing, as amended.<sup>12</sup>

## 2. Statutory Basis

Nasdaq believes the proposed rule change is consistent with the provisions of Sections 15A(b)(6)<sup>13</sup> and 11A(a)(1) of the Act.<sup>14</sup> Section 15A(b)(6) of the Act<sup>15</sup> requires the rules of the NASD to be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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; and not be designed to

<sup>9</sup> Pursuant to Rule 19b-5(c)(2), to qualify as a Pilot Trading System, a system must: (1) Be in operation for less than two years; (2) with respect to each security traded on such Pilot Trading System, during at least two of the last four consecutive calendar months, has traded no more than one percent of the average daily trading volume in the United States; and (3) with respect to all securities traded on such Pilot Trading System, during at least two of the last four consecutive calendar months, has traded no more than 20 percent of the average daily trading volume of all trading systems operated by the self-regulatory organization.

<sup>10</sup> Securities Exchange Act Release No. 45983 (May 23, 2002) 67 FR 38152 (May 31, 2002).

<sup>11</sup> Securities Exchange Act Release No. 45982 (May 23, 2002) 67 FR 38163 (May 31, 2002).

<sup>12</sup> Form PILOT-NASD-2001-01.

<sup>13</sup> 15 U.S.C. 78o-3(b)(6).

<sup>14</sup> 15 U.S.C. 78k-1(a)(1).

<sup>15</sup> 15 U.S.C. 78o-3(b)(6).

permit unfair discrimination between customers, issuers, brokers, or dealers. Section 11A(a)(1) of the Act<sup>16</sup> sets forth a finding of Congress that new data processing and communications techniques create opportunity for more efficient and effective market operations.

Nasdaq believes this proposed rule change is consistent with the NASD's obligations under the Act, as well as the finding of Congress, because it will allow Nasdaq to continue operating Primex while the Commission considers permanent approval. Among other things, the System provides members with an additional electronic, execution system, which is designed to provide members with flexibility in executing orders and the opportunity to obtain price improvement. To ensure the protection of investors, orders will not be executed at prices inferior to the National Best Bid or Offer.

### 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, as amended.

### 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.

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

The foregoing rule change has become effective upon filing pursuant to section 19(b)(3)(A)(iii) of the Act,<sup>17</sup> and subparagraph (f)(2) of Rule 19b-5 thereunder,<sup>18</sup> because the proposal will permit Nasdaq to continue operating Primex as a PTS while the Commission considers granting permanent approval. The proposal does not modify any rule or the operation of Primex.

At any time within 60 days of the filing of a rule change pursuant to Section 19(b)(3)(A) of the Act,<sup>19</sup> the Commission may summarily abrogate the 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>16</sup> 15 U.S.C. 78k-1(a)(1).

<sup>17</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>18</sup> 17 CFR 240.19b-4(f)(5).

<sup>19</sup> 15 U.S.C. 78s(b)(3)(A).

## 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 File No. SR-NASD-2002-156 and should be submitted by November 29, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>20</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 02-28429 Filed 11-7-02; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46761; File No. SR-Phlx-2002-49]

### Self-Regulatory Organizations; Order Approving Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to PACE Guarantee Exemption

November 1, 2002.

#### I. Introduction

On September 12, 2002, 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"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to exempt specialists from the requirement to execute certain orders that are traded-through by another

<sup>20</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.

market if those orders are for the exchange-traded funds ("ETFs") tracking the Nasdaq-100 Index ("QQQs"), the Dow Jones Industrial Average ("DIAMONDS"), and the Standard & Poor's 500 Index ("SPDRs").<sup>3</sup>

The proposed rule change was published for comment in the **Federal Register** on October 2, 2002.<sup>4</sup> No comments were received on the proposal. This order approves the proposal.

## II. Description of the Proposal

### A. Background

The Phlx is a participant in the Intermarket Trading System ("ITS"). The ITS is an order routing network designed to facilitate intermarket trading in exchange-listed equity securities among participating self-regulatory organizations ("SROs") based on current quotation information emanating from their markets. The terms of the linkage are governed by the ITS Plan, a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 11Aa3-2 thereunder.<sup>5</sup>

Section 8(d)(i) of the ITS Plan provides that absent reasonable justification or excuse, a member of a Participant Exchange should not effect trade-throughs.<sup>6</sup> If, however, a trade-through does occur and a complaint is received through ITS from the party whose bid or offer was traded through, the party who initiated the trade-through may be required to satisfy the bid or offer traded through or take other remedial action.<sup>7</sup> Each Participant

Exchange, including the Phlx,<sup>8</sup> has adopted and obtained Commission approval of a "trade-through rule," which is substantively the same as that provided in the ITS Plan.

In a recent Order, the Commission recognized that the ITS trade-through provisions were designed to encourage market participants to display their trading interest, and to help achieve best execution for customer orders in exchange-listed securities.<sup>9</sup> The Commission also acknowledged, however, that these rules were designed at a time when "the order routing and execution facilities of markets were much slower, intermarket competition was less keen, and the minimum quote increment for exchange-listed securities was 1/8 of a dollar (\$ 0.125)."<sup>10</sup> The Commission noted that with the introduction of decimal pricing and technology changes that greatly reduced execution times, the trade-through provisions of the ITS Plan have limited the ability of a Participant to provide an automated execution when a better price is displayed by another Participant that does not offer automated executions.<sup>11</sup> In support of this conclusion, the Commission explained that certain electronic systems are able to deliver executions in a fraction of a second, while ITS participants have, at a minimum, thirty seconds to respond to a commitment to trade. Because of this, "an ITS Participant seeking to execute a transaction at a price inferior to the price quoted by another ITS Participant must generally either (i) attempt to access the other Participant's quote, which could delay the customer's transaction by thirty seconds or more, or (ii) become potentially liable to the other Participant for the amount by which its quote was traded through."<sup>12</sup>

In its Order, the Commission stated that the ITS trade-through provisions were particularly restrictive in the case of the QQQs, DIAMONDS and SPDRs, as these ETFs are highly liquid securities, and their value is derived from the values of the underlying shares. The Commission noted that immediate execution of these securities might be more important than the opportunity to obtain a better price to certain investors.<sup>13</sup> To address this issue, the Commission granted a *de minimis* exemption from the trade-through provisions of the ITS Plan with respect

to transactions in the QQQs, DIAMONDS and SPDRs that are effected at a price no more than three cents away from the best bid and offer quoted in the Consolidated Quote System ("CQS"). This exemption, which went into effect on September 4, 2002 and will remain in effect until June 4, 2003, allows Participants to execute transactions, through automatic execution or otherwise, without attempting to access the quotes of other Participants when the expected price improvement would not be significant.<sup>14</sup>

### B. Applicability to the Phlx

Phlx Rule 229.10(a)(iii) requires a Phlx specialist to execute certain orders that are traded-through by another market center.<sup>15</sup> Although the Exchange Rule imposes this obligation on the specialist, the specialist is entitled to satisfaction of those orders pursuant to Section 8(d) of the ITS Plan. However, for trade-throughs that are enumerated in the ITS Exemption Order and therefore are no longer prohibited by the ITS Plan, the specialist does not have recourse to seek satisfaction for these orders and is alone responsible for those executions. Therefore, the Phlx believes that its provision guaranteeing an execution no longer makes sense, and further believes that the provision now unduly burdens specialists by requiring a specialist to execute orders in situations where the specialist does not have access to trading at that price. Thus, the Exchange is proposing to amend Phlx Rule 229 Supplementary Material Section 10(a)(iii) to state that the obligations described therein shall not apply to the ETFs that are the subject of the ITS Exemption Order for so long as the exemption granted in the order remains in effect.

## III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>16</sup> In particular, the

<sup>14</sup> *Id.* at 56608.

<sup>15</sup> Specifically, this Rule provides that if 100 or more shares print through the limit price on any exchange(s) eligible to compose the PACE Quote, which is the best bid/ask quote among the Amex, BSE, Cincinnati, CSE, NYSE, PCX, Phlx, and the Intermarket Trading System/Computer Assisted Execution System ("ITS/CAES"), after the time of entry of any such order into PACE, the specialist shall execute all such orders at the limit price without waiting for an accumulation of 1000 shares to price at the limit price on the NYSE. See also Phlx Rule 229, Supplementary Material Section .10(a)(ii).

<sup>16</sup> In approving this rule proposal, the Commission notes that it has also considered the

<sup>3</sup> The Exchange does not currently trade DIAMONDS or SPDRs but may determine to do so in the future. The Exchange does trade QQQs.

<sup>4</sup> See Securities Exchange Act Release No. 46545 (September 24, 2002), 67 FR 61944. The proposed rule change is currently in effect as a pilot. See Securities Exchange Act Release Nos. 46481 (September 10, 2002), 67 FR 58669 (September 17, 2002)(notice of immediate effectiveness of pilot for the period September 4, 2002 to October 4, 2002); 46615 (October 8, 2002), 67 FR 63723 (October 15, 2002)(notice of immediate effectiveness of extension of pilot to November 3, 2002.)

<sup>5</sup> See Securities Exchange Act Release No. 19456 (January 27, 1983), 48 FR 4938 (February 3, 1983). The SROs participating in ITS include the American Stock Exchange LLC ("Amex"), the Boston Stock Exchange, Inc. ("BSE"), the Chicago Board Options Exchange, Inc. ("CBOE"), the Chicago Stock Exchange, Inc. ("CSE"), the Cincinnati Stock Exchange, Inc. ("Cincinnati"), the National Association of Securities Dealers, Inc. ("NASD"), the New York Stock Exchange, Inc. ("NYSE"), the Pacific Stock Exchange, Inc. ("PCX"), and the Phlx (collectively "Participant Exchanges").

<sup>6</sup> A trade-through results when a member purchases (or sells) a security at a price that is higher (lower) than the price offered in one or more of the other ITS participant's markets. See ITS Plan, Section 8(d)(i).

<sup>7</sup> See ITS Plan, Exhibit B.

<sup>8</sup> See Phlx Rule 2001A.

<sup>9</sup> See Securities Exchange Act Release No. 46428 (August 28, 2002), 67 FR 56607 (September 4, 2002) at 56607 ("ITS Exemption Order").

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

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

<sup>12</sup> *Id.* at 56607-8.

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

Commission finds that the proposed rule is consistent with the requirements of Section 6(b)(5) of the Act<sup>17</sup> because it is designed to facilitate transactions in securities; 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; and is not designed to permit unfair discrimination between customers, issuers, brokers or dealers.

By adopting the proposed exemption, the Exchange removes the specialist's obligation to provide trade-through protection in situations where it will not be permitted to seek satisfaction through ITS from the primary market. This obligation was one the Phlx assumed voluntarily in order to make its market more attractive to sources of order flow, not an obligation the Act imposes on a market. The Commission believes that the business decision to potentially forego order flow by no longer providing print protection is a judgment the Act allows the Phlx to make.<sup>18</sup>

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>19</sup> that the proposed rule change (SR-Phlx-2002-49) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>20</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 02-28427 Filed 11-7-02; 8:45 am]

BILLING CODE 8010-01-P

## DEPARTMENT OF STATE

[Public Notice 4202]

### Culturally Significant Objects Imported for Exhibition Determinations: "Old Master Galleries"

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et*

proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

<sup>18</sup> The Commission notes that the Phlx's proposed rule change will remain in effect only until the expiration of the Commission's ITS Exemption Order on June 4, 2003.

<sup>19</sup> 15 U.S.C. 78f(b)(2).

<sup>20</sup> 17 CFR 200.30-3(a)(12).

*seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236 of October 19, 1999, as amended, I hereby determine that the object to be included in the exhibition "Old Master Galleries," imported from abroad for temporary exhibition within the United States, is of cultural significance. The object is imported pursuant to loan agreement with the foreign owner. I also determine that the exhibition or display of the exhibit object at The Metropolitan Museum of Art, New York, NY, from on or about November 17, 2002, to on or about November 17, 2004, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** For further information, including a list of the exhibit object, contact Julianne Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State, (telephone: 202/619-6529). The address is U.S. Department of State, SA-44, 301 4th Street, S.W., Room 700, Washington, D.C. 20547-0001.

Dated: November 4, 2002.

**Patricia S. Harrison,**

*Assistant Secretary for Educational and Cultural Affairs, Department of State.*

[FR Doc. 02-28513 Filed 11-7-02; 8:45 am]

BILLING CODE 4710-08-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Notice of Intent To Rule on Application 02-04-C-00-BUF To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Buffalo Niagara International Airport, and Use Only at Niagara Falls International Airport, New York

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of intent to rule on application.

**SUMMARY:** The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Buffalo Niagara International Airport and use only at Niagara Falls International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101-508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

**DATES:** Comments must be received on or before December 9, 2002.

**ADDRESSES:** Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: FAA, New York Airports District Office, 600 Old Country Road, Suite 446, Garden City, NY 11530.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Vito J. Sportelli, of the Niagara Frontier Transportation Authority at the following address: 181 Ellicott Street, Buffalo, New York 14203.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Niagara Frontier Transportation Authority under § 158.23 of part 158.

**FOR FURTHER INFORMATION CONTACT:** Eleanor Schifflin, PFC Program Manager, Regional Office, 1 Aviation Plaza, Jamaica, New York 11434-4848 at (718) 553-3354. The application may be reviewed in person at this same location.

**SUPPLEMENTARY INFORMATION:** The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Buffalo Niagara International Airport and use at Niagara Falls International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101-508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On October 9, 2002, the FAA determined that the application to impose and use the revenue from a PFC submitted by Niagara Frontier Transportation Authority was substantially complete within the requirements of § 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than January 18, 2003.

The following is a brief overview of the application.

*PFC Application No.:* 02-04-C-00-BUF.

*Level of the proposed PFC:* \$3.00.

*Proposed charge effective date:* May 1, 2006.

*Proposed charge expiration date:* January 1, 2010.

*Total estimated PFC revenue:* \$24,561,653.

Brief description of proposed project(s) at Buffalo Niagara International Airport:

- Relocation of Security Checkpoints.
- Perform Runway 14-32 Safety Area Improvements.
- Purchase Safety Equipment—Air Rescue Fire Fighting Vehicles.