

The rationale for the proposed changes in this filing is to make the pricing for executions on the ArcaEx more competitive. The Exchange evaluated the economics of modifying its current market data rebate structure and determined that it was feasible and appropriate, given the costs involved and competitive concerns.

## 2. Statutory Basis

The PCX believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Act,<sup>8</sup> in general, and with Section 6(b)(5) of the Act,<sup>9</sup> in particular, in that it is 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system.

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

The PCX does not believe that the proposed rule change would 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 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. 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-PCX-2005-16 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-PCX-2005-16. 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 Room. Copies of such filing also will be available for inspection and copying at the principal office of the PCX. 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-NYSE-2005-16 and should be submitted on or before August 4, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51996; File No. SR-Phlx-2005-02]

### Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to Volume Weighted Average Price Crosses

July 8, 2005.

On January 25, 2005, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Security Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to permit certain customer-to-customer crosses to be executed at a volume weighted average price ("VWAP") during the Exchange's Post Primary Session.<sup>3</sup> On May 4, 2005, the Phlx submitted Amendment No. 1 to the proposed rule change,<sup>4</sup> and on May 18, 2005, the Phlx submitted Amendment No. 2 to the proposed rule change.<sup>5</sup> The proposed rule change, as amended, was published for comment in the **Federal Register** on June 3, 2005.<sup>6</sup> The Commission received no comments on the proposal. The order approves the proposed rule change, as amended.

The Phlx proposed to amend Phlx Rule 126, "Crossing" Orders, by adding new subsection (i) to permit certain customer-to-customer<sup>7</sup> crosses to be executed at a VWAP<sup>8</sup> during the

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

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

<sup>3</sup> According to Phlx Rule 101, the Post Primary Session ("PPS") operated from 4 to 4:15 p.m.

<sup>4</sup> In Amendment No. 1, the Phlx: (1) Eliminated the concept of linking a VWAP cross to a "primary market" and instead proposed to link a VWAP cross to correspond to any single market, and (2) requested relief from the provisions of Rule 11Ac1-1 under the Act (the "Quote Rule") with respect to VWAP crosses.

<sup>5</sup> In Amendment No. 2, the Phlx: (1) Eliminated the proposed rule text addressing the treatment of VWAP crosses in the case of trading halts, (2) corrected a citing reference to Phlx auction market rules, and (3) clarified the description of the "b" modifier.

<sup>6</sup> See Securities Exchange Act Release No. 51731 (May 24, 2005), 70 FR 32692 (June 3, 2005) ("Notice").

<sup>7</sup> Pursuant to Phlx Rule 126(b) a "customer" order would include any order which a broker represents in an agency capacity, including any order of a market maker or other broker-dealer not affiliated with the broker, and it would not include any order of a broker-dealer affiliated with the executing broker, or any associated person of such broker-dealer.

<sup>8</sup> The Commission has observed that the VWAP for a security is generally determined by: (1) Calculating raw values for regular session trades reported by the Consolidated Tape during the

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> 17 CFR 200.30-3(a)(12).

Exchange's PPS.<sup>9</sup> The new crossing transactions would be permitted to be executed at prices which are equal to any single market or consolidated market volume weighted average prices calculated for the entire trading day from 9:30 am. to 4 p.m., or for any portion of the trading day, as may be agreed to by the two parties to the trade.<sup>10</sup> Pursuant to the proposed rule change, the VWAP trade would be reported to the tape with the identifier "b" to the nearest decimal eligible for reporting by the Exchange. The "b" would distinguish VWAP trades from other transactions that may possibly be reported after the close.

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of Section 6 of the Act<sup>11</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>12</sup> In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,<sup>13</sup> which requires, among other things, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission believes that the proposed rule change, as amended, will present market participants on Phlx with a new means of executing transactions at a VWAP, thereby enhancing investors'

regular trading day by multiplying each such price by the total number of shares traded at that price; (2) compiling an aggregate sum by adding each calculated raw value from step one above; and (3) dividing the aggregate sum by the total number of reported shares for that day in the security. See Securities Exchange Act Release No. 48709 (October 28, 2003), 68 FR 62972, 62982, at n. 88 (November 6, 2003) (the Regulation SHO Proposing Release). Pursuant to the Exchange's proposed rule change, however, members would be able to elect to calculate a VWAP using only a single market's prices rather than all trades reported by the Consolidated Tape, and could elect to base that calculation on trades reported during a particular time slice during the day rather than including all trades reported during the regular trade day. Members would be required to document the particular trades they have agreed to be used in the calculation.

<sup>9</sup> According to Phlx Rule 101, the PPS operates from 4 to 4:15 p.m.

<sup>10</sup> These trades would therefore not be subject to the Phlx Rules 118, 119, and 120, which collectively establish auction market rules of priority, parity and precedence of order on the equity floor.

<sup>11</sup> 15 U.S.C. 78f.

<sup>12</sup> In approving this proposed rule change, as amended, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

choices. Specifically, the proposed rule change would permit certain customer-to-customer crosses to be executed at a VWAP during the Exchange's PPS.

The Phlx also has requested an exemption from Rule 11Ac1-1 of the Act ("Quote Rule") with respect to these VWAP crosses.<sup>14</sup> The Quote Rule requires a national securities exchange to collect bids, offers, quotation sizes, and aggregate quotation sizes from "responsible brokers or dealers" for each reported security listed or admitted to unlisted trading privileges and to make them available to quotation vendors throughout the trading day with respect to reported securities traded on such exchange floor.<sup>15</sup> In addition, responsible brokers and dealers must promptly communicate their best bids, offers, and quotation sizes for any subject security to the exchange and be firm for their published bids and offers in any amount up to their published quotation sizes.<sup>16</sup> A bid or offer is defined in the Quote Rule as "the bid price and the offer price communicated by an exchange member or OTC market maker to any broker or dealer, or to any customer, at which it is willing to buy or sell one or more round lots of a covered security, as either principal or agent, but shall not include indications of interest."<sup>17</sup> To constitute a bid or offer, the underlying trading interest must have been communicated to at least one other potential counterparty. Bids and offers are intended to attract other parties to deal with the person publishing the bid or offer at the quoted price.

On the other hand, the Phlx is requesting relief from the Quote Rule because, with respect to the proposed Phlx Rule 126(i) VWAP crosses, the Phlx represents that bids and offers will

<sup>14</sup> 17 CFR 240.11Ac1-1. See also Draft letter from Carla Behnfeldt, Director, Legal Department New Product Development Group, Phlx, to Larry E. Bergmann, Senior Associate Director, Division of Market Regulation, Commission, dated February 3, 2005.

In addition, the Phlx has requested an exemption from the tick test provisions of Rule 10a-1 of the Act ("Short Sale Rule") for crosses with a short sale component executed pursuant to proposed Phlx Rule 126(i). 17 CFR 240.10a-1. See also Notice, *supra* note 6, at 32693. The Commission is currently reviewing the Phlx's request for exemption from the Short Sale Rule.

<sup>15</sup> Subsection (a)(21)(i) of the Quote Rule defines the term "responsible broker or dealer" to mean: "[w]hen used with respect to bids or offers communicated on an exchange, any member of such exchange who communicates to another member on such exchange, at the location (or locations) designated by such exchange for trading in a covered security, a bid or offer for such covered security, as either principal or agent. \* \* \*" 17 CFR 240.11Ac1-1(a)(21)(i).

<sup>16</sup> See 17 CFR 240.11Ac1-1(c).

<sup>17</sup> 17 CFR 240.11Ac1-1(a)(4).

not be made continuously and trades entered pursuant to Phlx Rule 126(i) would be entered for execution at a VWAP rather than at a specified bid or offer. In addition, the price of a VWAP cross would not be determined until such time as the VWAP is calculated. Furthermore, on account of the absence of a specified bid or offer, the Phlx represents that a VWAP cross is not a mechanism by which Phlx members would broadcast prices to other members and trade with one another at those prices. Thus, the Phlx represents that VWAP crosses do not implicate the reporting of bids and offers for the national market system concerns that Section 11A addresses.

Therefore, under proposed Phlx Rule 126(i), it would not be possible for the Phlx to collect firm bids and offers at specific prices with respect to VWAP crosses and transmit each information on a continuous basis to quotation vendors. Only after the VWAP cross is effected after the close of trading is the Phlx able to transmit pricing information to vendors. Accordingly, the Commission believes it is appropriate to grant the Phlx's request for exemption from the requirement of the Quote Rule for VWAP crosses executed pursuant to proposed Phlx Rule 126(i).

For the foregoing reasons, the Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Act.<sup>18</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>19</sup> that the proposed rule change (SR-Phlx-2005-02), as amended, be, and it hereby is, approved.

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

**J. Lynn Taylor,**

*Assistant Secretary.*

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<sup>18</sup> 15 U.S.C. 78f(b)(5).

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

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