

market order or marketable limit order on the same side of the market as the Agency Order ends the PIM, it would execute against any unexecuted Improvement Orders after the Agency Order is executed in full. The ISE believes that this would provide an opportunity for price improvement to orders in the regular Exchange market.<sup>9</sup>

The PIM would be available for orders of all sizes for a Pilot Period expiring on July 13, 2005. The ISE represents that during this pilot period it would provide the Commission with the following information on a monthly basis:

(1) The number of orders of fewer than 50 contracts entered into the PIM;

(2) The percentage of all orders of fewer than 50 contracts sent to the ISE that are entered into the PIM;

(3) The percentage of all ISE trades represented by orders of fewer than 50 contracts;

(4) The percentage of all ISE trades effected through the PIM represented by orders of fewer than 50 contracts;

(5) The percentage of all contracts traded on the ISE represented by orders of fewer than 50 contracts;

(6) The percentage of all contracts effected through the PIM represented by orders of fewer than 50 contracts;

(7) The spread in the option, at the time an order of fewer than 50 contracts is submitted to the PIM;

(8) Of PIM trades, the percentage done at the NBBO plus \$.01, plus \$.02, plus \$.03, etc.; and

(9) The number of PIM orders submitted when the spread was \$.05, \$.10, \$.15, etc. For each spread, we will specify the percentage of contracts in orders of fewer than 50 contracts submitted to the PIM that were traded by: (a) The EAM that submitted the order to the PIM; (b) ISE market makers assigned to the class; (c) Improvement Orders; and (d) unrelated orders (orders

\$.02 improvement for the market order over the best offer price and a \$.02 improvement for the Agency Order over the PIM price. The 50 contracts remaining in the Agency Order would be executed at the PIM price of \$.06, assuming that there were 50 contracts available at that price. Telephone conversation between Michael Simon, Senior Vice President and General Counsel, ISE, and Deborah Flynn, Assistant Director, Division, Commission, on February 25, 2004. All executions would be in \$.01 increments, and rounding would be in favor of the Agency Order. Thus, in this example, if the best PIM price had been \$.07, the market order would have executed against the Agency Order for 50 contracts at \$.09.

<sup>9</sup> For example, assume (i) the NBBO is \$5 to \$5.10, (ii) a PIM has been initiated for an Agency Order to sell 100 contracts, and (iii) the best PIM price is \$.06 for 125 contracts. If a market order to sell 50 contracts is received, the PIM would terminate, the Agency Order would be executed at \$.06 and the market order to sell would receive 25 contracts at \$.06.

in standard increments entered during the PIM).

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act<sup>10</sup> in general, and furthers the objectives of section 6(b)(5)<sup>11</sup> in particular, in that it is designed to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the ISE believes that the proposal would provide an opportunity for Public Customers to receive price improvement of their orders.

### 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

The Exchange did not solicit or receive written comments on 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 Exchange 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 proposal, as amended, 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.

Comments may also be submitted electronically at the following e-mail

address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-ISE-2003-06. The 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, comments should be sent in hardcopy or by e-mail but not by both methods. 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 Amex. All submissions should be submitted by March 24, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

[FR Doc. 04-4716 Filed 3-2-04; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49324; File No. SR-Phlx-2004-08]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Philadelphia Stock Exchange, Inc. To Amend Its Equity Option Specialist Deficit (Shortfall) Fee

February 26, 2004.

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 January 30, 2004, 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, II, and III below, which Items have been prepared by the Exchange. On February 25, 2004, the Exchange filed Amendment No. 1 to the proposed

<sup>12</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>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

rule change.<sup>3</sup> The proposed rule change, as amended, has been filed by the Phlx as establishing or changing a due, fee, or other charge, pursuant to section 19(b)(3)(A)(ii)<sup>4</sup> of the Act and Rule 19b-4(f)(2)<sup>5</sup> thereunder, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Exchange proposes to amend its Equity Option Specialist Deficit (Shortfall) fee ("shortfall fee") to adopt a revised tiered threshold schedule for: (1) Any newly listed top 120 option;<sup>6</sup> and (2) any top 120 option acquired by a new specialist unit, not affiliated with an existing Phlx options specialist unit. The text of the proposed rule change, as amended, is available at the Phlx and at the Commission.

#### *Current Fee Structure*

Currently, the Exchange charges specialist units<sup>7</sup> a monthly \$0.35 per contract shortfall fee for trading in any top 120 option if at least 12 percent of the total national monthly contract volume ("volume threshold") is not effected on the Exchange in that month.<sup>8</sup> The fee is limited to \$10,000 per month per option if the total monthly market share effected on the Phlx for a top 120 option is equal to or greater than 50 percent of the volume threshold in effect. The current volume threshold of 12 percent does not apply during the transition period when an option is first listed; a tiered threshold is implemented during this transition period such that the requisite volume threshold is three percent for the first full calendar month of trading and six

percent for the second full calendar month of trading.<sup>9</sup>

#### *Proposed Fee Structure*

The Exchange now proposes to amend its tiered shortfall fee thresholds that are implemented during transition periods for any newly listed top 120 options<sup>10</sup> or for any top 120 option (including those equity options listed on the Exchange before February 1, 2004) acquired by a new specialist unit.<sup>11</sup> The thresholds will be implemented in monthly stages, similar to current threshold requirements, beginning with the first business day of the first full month following the commencement of trading a top 120 option. Listed below are the amended shortfall fee thresholds:

First full month of trading: 0% national market share  
Second full month of trading: 3% national market share  
Third full month of trading: 6% national market share  
Fourth full month of trading: 9% national market share  
Fifth full month of trading (and thereafter): 12% national market share<sup>12</sup>

The \$10,000 limit would apply to each threshold provided that the market share effected on the Phlx for a top 120 option is equal to or greater than 50 percent of the applicable month's volume threshold.<sup>13</sup>

<sup>9</sup> In connection with the requisite volume threshold of three percent and six percent, the \$10,000 limit applies if at least 1.5 percent of the total national monthly contract volume was reached in the first full calendar month of trading and at least three percent of the total national monthly contract volume was reached in the second full calendar month of trading. See Securities Exchange Act Release Nos. 43201 (August 23, 2000), 65 FR 52465 (August 29, 2000) (SR-Phlx-00-71); and 48207 (July 22, 2003), 68 FR 44558 (July 29, 2003) (SR-Phlx-2003-47).

<sup>10</sup> Any top 120 option listed after February 1, 2004, will be considered newly listed for purposes of this proposal.

<sup>11</sup> A new specialist unit is one that is approved to operate as a specialist unit by the Options Allocation, Evaluation and Securities Committee on or after February 1, 2004, and is a specialist unit that is not currently affiliated with an existing options specialist unit as reported on the member organization's Form BD, which refers to direct and indirect owners, or as reported in connection with any another financial arrangement, such as is required by Exchange Rule 783. See Amendment No. 1.

<sup>12</sup> Therefore, if a new specialist unit acquires a top 120 option in mid-February, then, in March, the specialist unit will not be assessed a shortfall fee, but will be assessed a 3 percent shortfall fee in April, its second full month of trading, 6 percent in May, 9 percent in June and then 12 percent for July and future months.

<sup>13</sup> For example, the \$10,000 limit would apply in the second calendar month of trading if at least 1.5 percent of the total national monthly contract volume is reached.

Any new specialist unit that is allocated a top 120 option may implement the tiered shortfall fee thresholds only in the first 60 calendar days of operating.<sup>14</sup>

The current rate of \$0.35 per contract and other procedures relating to the shortfall fee remain unchanged at this time.<sup>15</sup> The Exchange intends to implement this shortfall fee proposal to be effective February 1, 2004.<sup>16</sup>

### **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, as amended, and discussed any comments it received on the proposed rule change, as amended. 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 create an incentive for new specialist units to enter the Phlx market place and to give existing specialist units who trade in a newly listed top 120 option a reasonable period to attract order flow to the Exchange, without imposing a potentially onerous financial burden. A revised tiered threshold should encourage specialists to continue to compete for market share in the top 120 options, while reducing the economic burden on new specialists who trade in the top 120 options and

<sup>14</sup> Therefore, if a new specialist unit begins trading any equity option on the Phlx, it may only utilize the tiered shortfall fee thresholds if it begins trading a top 120 option during its initial 60 days of operation. For example, if a specialist unit begins trading an equity option on February 2, and begins trading a top 120 option 60 days from that date, it may utilize the tiered thresholds.

<sup>15</sup> For example, the total volume calculation for purposes of determining the requisite thresholds will continue to be based on the current month's volume and the three-month differentiation to determine whether an equity option is considered a top 120 option will also remain in effect, i.e., December's top 120 options are based on September's volume. Any excess volume (over the total volume target) may not be carried over to a future month. See Securities Exchange Act Release No. 43201 (August 23, 2000), 65 FR 52465 (August 29, 2000) (SR-Phlx-00-71).

<sup>16</sup> A top 120 option that is not subject to this proposal (i.e., listed before February 1, 2004) will continue to be subject to the threshold requirements currently in effect.

<sup>3</sup> See letter from Cynthia Hoekstra, Counsel, Phlx, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated February 25, 2004 ("Amendment No. 1"). In Amendment No. 1, Phlx clarified the definition of a new specialist unit for purposes of the fee and added the definition to the fee schedule.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>5</sup> 17 CFR 240.19b-4(f)(2).

<sup>6</sup> The Exchange defines a top 120 option as one of the 120 most actively traded equity options in terms of the total number of contracts in that option that were traded nationally for a specified month, based on volume reflected by the Options Clearing Corporation.

<sup>7</sup> The Exchange uses the terms "specialist" and "specialist unit" interchangeably herein.

<sup>8</sup> See Securities Exchange Act Release No. 48459 (September 8, 2003), 68 FR 54034 (September 15, 2003) (SR-Phlx-2003-61). Specialist units may elect to pay a fixed monthly fee in lieu of Phlx specialist equity and index option transaction charges and shortfall fees.

existing specialists who trade in a newly listed top 120 option.

## 2. Statutory Basis

The Exchange believes the proposed rule change, as amended, is consistent with the provisions of section 6(b) of the Act,<sup>17</sup> in general, and section 6(b)(4) of the Act,<sup>18</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among Exchange members.

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

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

### 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 proposed rule change, as amended, has become effective pursuant to section 19(b)(3)(A)(ii) of the Act<sup>19</sup> and Rule 19b-4(f)(2)<sup>20</sup> thereunder, because it changes a fee imposed by the Exchange. 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.<sup>21</sup>

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views and

arguments concerning the foregoing, including whether the proposed rule change, as amended, 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. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-Phlx-2004-08. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. 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 Phlx. All submissions should refer to File No. SR-Phlx-2004-08 and should be submitted by March 24, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>22</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04-4714 Filed 3-2-04; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49320; File No. SR-Phlx-2004-09]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Permit Fees

February 25, 2004.

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 January 30, 2004, 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, II, and III below, which the Exchange has prepared. 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 proposes to amend its schedule of dues, fees and charges to adopt a new category of permit holders for billing purposes to address possible situations where permit holders would not fall under one of the two existing permit fee categories.

The Exchange recently adopted the following permit fees, which are assessed based on how each permit is used:<sup>3</sup>

#### Order Flow Provider Permit Fee:<sup>4</sup>

a. Permits used only to submit orders to the equity, foreign currency options or options trading floor (one floor only).	\$200 per month
b. Permits used only to submit orders to more than one trading floor .....	\$300 per month
<b>Floor Broker, Specialist or ROT (on any trading floor) or Off-Floor Trader Permit Fee</b>	
a. First permit .....	\$1,200 per month
b. Additional permits for members in the same organization .....	\$1,000 per month

<sup>4</sup> This fee applies to a permit held by a permit holder who does not have physical access to the Exchange's trading floor, is not registered as a Floor Broker, Specialist or Registered Options Trader ("ROT") (on any trading floor) or Off-Floor Trader, and whose member organization submits orders to the Exchange. See Phlx Rule 620(a).

Any member who qualifies a member organization in more than one category

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

<sup>18</sup> 15 U.S.C. 78f(b)(4).

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

<sup>20</sup> 17 CFR 240.19b-4(f)(2).

<sup>21</sup> See 15 U.S.C. 78s(b)(3)(C). For purposes of calculating the 60-day abrogation period, the Commission considers the period to commence on February 25, 2004, the date the Phlx filed Amendment No. 1.

<sup>22</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> See Securities Exchange Act Release No. 49157 (January 30, 2004), 69 FR 5883 (February 6, 2004) (SR-Phlx-2004-02).