

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change and Amendment No. 1 thereto (File No. SR-PCX-2003-59) are approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49170; File No. SR-Phlx-2004-05]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to the Payment for Order Flow Fees for the Top 120 Options

February 2, 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 22, 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 Phlx 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 establish its equity options payment for order flow fees imposed on the transactions of Phlx Registered Options Traders ("ROTs") for the period from February 2004 through April 2004 for the top 120 equity options based on volume statistics from October, November and December 2003,<sup>3</sup> as set forth on the ROT Equity

Option Payment for Order Flow Charges Schedule<sup>4</sup> and subject to certain exceptions listed below. The Phlx intends to implement the payment for order flow fees for trades settling on or after February 1, 2004 through April 30, 2004. The rate levels would not change: the top-ranked equity option would be charged a fee of \$1.00 per contract; the next 49 equity options would be charged a fee of \$.40 per contract; and no fee would be imposed for the remaining equity options in the top 120.<sup>5</sup> The Exchange's ROT Equity Option Payment for Order Flow Charges Schedule is available at the Phlx 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 Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had 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.

measuring period for the top 120 equity options was based on volume statistics from July, August and September 2003. See Securities Exchange Act Release No. 48688 (October 24, 2003), 68 FR 61845 (October 30, 2003) (SR-Phlx-2003-70). For the payment for order flow fees imposed on trades settling on or after February 1, 2004 through April 30, 2004, as set forth in this proposal, the measuring period for the top 120 equity options is based on volume statistics from October, November, and December 2003.

<sup>4</sup> To avoid confusion, the ROT Equity Option Payment for Order Flow Charges Schedule reflects only those options being charged more than \$0.00.

<sup>5</sup> Under the Exchange's payment for order flow program, a 500 contract cap per individual cleared side of a transaction is imposed. Thus, the applicable payment for order flow fee would be imposed only on the first 500 contracts per individual cleared side of a transaction. For example, if a transaction consists of 750 contracts by one ROT, the applicable payment for order flow fee would be applied to, and capped at, 500 contracts for that transaction. Also, if a transaction consists of 600 contracts, but is divided equally among three ROTs, the 500 contract cap would not apply to any such ROT and each ROT would be assessed the applicable payment for order flow fee on 200 contracts, as the payment for order flow fee is assessed on a per ROT, per transaction basis. See Securities Exchange Act Release No. 47958 (May 30, 2003), 68 FR 34026 (June 6, 2003) (proposing SR-Phlx-2002-87) and Securities Exchange Act Release No. 48166 (July 11, 2003), 68 FR 42540 (July 17, 2003) (approving SR-Phlx-2002-87).

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

The Phlx has reinstated its payment for order flow program.<sup>6</sup> Under the program, the Phlx charges ROTs a per-contract fee with respect to their transactions in the top 120 most actively traded equity options issues, subject to certain exceptions.<sup>7</sup> The fees are set forth on the Phlx's ROT Equity Option Payment for Order Flow Charges Schedule.

##### 1. Purpose

The purpose of the proposed rule change is to establish the payment for order flow fees for the top 120 equity options for trades settling on or after February 1, 2004 through April 30, 2004. The Phlx will file with the Commission a proposed rule change to address changes to the fee schedule for subsequent time periods. The Phlx is not making any other changes to its payment for order flow program at this time.

##### 2. Statutory Basis

The Exchange believes that this proposal to amend its schedule of dues, fees and charges would be an equitable allocation of reasonable fees among Phlx members, and that the proposal is consistent with Section 6(b) of the Act<sup>8</sup> and furthers the objectives of Section 6(b)(4) of the Act.<sup>9</sup>

#### 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

The Phlx neither solicited nor received written comments on this proposal.

<sup>6</sup> See Securities Exchange Act Release No. 47090 (December 23, 2002), 68 FR 141 (January 2, 2003) (SR-Phlx-2002-75).

<sup>7</sup> The payment for order flow fee does not apply to specialist transactions or to transactions between: (1) A ROT and a specialist; (2) a ROT and a ROT; (3) a ROT and a firm; and (4) a ROT and a broker-dealer. According to the Phlx, the fee is not imposed with respect to the above-specified transactions because the primary focus of the program is to attract order flow from customers. The payment for order flow fee also does not apply to index or foreign currency options.

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

<sup>9</sup> 15 U.S.C. 78ff(b)(4).

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</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> The Exchange's payment for order flow fee is imposed on transactions in the top 120 most actively traded equity options in terms of the total number of contracts that are traded nationally, based on volume statistics provided by the Options Clearing Corporation. The measuring period for the top 120 equity options encompasses three months and the Exchange files a separate proposed rule change for each three-month trading period. With respect to the payment for order flow fees imposed on trades settling on or after November 1, 2003 through January 31, 2004, for example, the

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

The foregoing proposed rule change has been designated as a fee change pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>10</sup> and Rule 19b-4(f)(2)<sup>11</sup> thereunder. Accordingly, the proposal has taken effect upon filing with the Commission. At any time within 60 days after the filing of the proposed rule change, 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.

### 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. 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-2004-05. 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, comments should be sent in hard copy or by e-mail, but not by both methods. 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-2004-05 and should be submitted by March 2, 2004.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49173; File No. SR-Phlx-2004-07]

#### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to the Extension of Its Pilot Program To Implement Its Existing Fee Schedule for Electronic Communications Networks

February 2, 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 28, 2004, 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 Exchange. 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 Exchange proposes to extend the Exchange's current pilot program for an additional one-year period (until January 31, 2005), in order to continue to impose a \$2,500 monthly fee for Electronic Communications Networks ("ECNs") that are member organizations and send order flow to the Exchange's equity trading floor.<sup>3</sup> The current pilot

<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>3</sup> As stated on the Phlx fee schedule, ECNs shall mean any electronic system that widely disseminates to third parties orders entered therein by an Exchange market maker or over-the-counter ("OTC") market maker, and permits such orders to be executed against in whole or in part; except that the term ECN shall not include: any system that crosses multiple orders at one or more specified times at a single price set by the ECN (by algorithm or by any derivative pricing mechanism) and does not allow orders to be crossed or executed against directly by participants outside of such times; or, any system operated by, or on behalf of, an OTC market-maker or exchange market-maker that executes customer orders primarily against the account of such market maker as principal, other

program is scheduled to expire on January 31, 2004.<sup>4</sup> The \$2,500 fee would continue to apply to ECN trades where the ECN is not acting as a specialist or a floor broker, but rather an order flow provider. This fee is in lieu of the equity transaction value charge that would normally apply to (non-specialist) equity trades.

The text of the proposed rule change is available at the Office of the Secretary, the Phlx, and 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 Exchange 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 Exchange 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 extend the Exchange's current ECN pilot program that imposes a \$2,500 monthly fee for ECNs that are member organizations and send order flow to the Exchange's equity trading floor for an additional one-year period, until January 31, 2005. The continuation of the \$2,500 fee is intended to attract equity order flow from ECNs to the Exchange by continuing to substitute a fixed monthly fee, in light of the potential for high volumes of order flow from ECNs.<sup>5</sup>

than riskless principal. See SEC Rule 11Ac1-1(a)(8). The Exchange is herein proposing minor changes to this definition, which appears on the fee schedule, to correct inconsistencies between the text of the SEC Rule 11Ac1-1(a)(8) and the text that appears on the Exchange's fee schedule.

<sup>4</sup> See Securities Exchange Act Release No. 47120 (January 3, 2003), 68 FR 1498 (January 10, 2003) (Notice of Filing and Immediate Effectiveness of SR-Phlx-2002-83, extending the ECN fee pilot program until January 31, 2004). See also Securities Exchange Act Release Nos. 44155 (April 5, 2001), 66 FR 19274 (April 13, 2001) (Notice of Filing and Immediate Effectiveness of SR-Phlx-2001-09, adopting the ECN fee program on a pilot basis); and 45456 (February 19, 2002), 67 FR 8831 (February 26, 2002) (Notice of Filing and Immediate Effectiveness of SR-Phlx-2002-08, extending the ECN fee pilot program until January 31, 2003).

<sup>5</sup> To recoup costs due from the Exchange to the Commission pursuant to Section 31(b) of the Act,

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>11</sup> 17 CFR 240.19b-4(f)(2).