

the program, Phlx ROTs are assessed a payment for order flow fee, per contract, per options issue, as set forth in the Phlx's ROT Equity Option Payment for Order Flow Charges Schedule, subject to certain exceptions.⁶

1. Purpose

The purpose of the proposed rule change is to establish a 500 contract cap, which the Phlx believes is reasonable and equitable because capping each trade with a 500 contract cap should provide sufficient payment for order flow funds for the specialists while lessening the economic burden on ROTs.⁷ In the Phlx's view, the imposition of a cap should provide increased liquidity and encourage competition in markets where ROTs may otherwise not be able to compete. Moreover, the Phlx believes that the absence of a cap would cause ROTs to incur expenses that may impair their ability to participate in a larger share of the market.

2. Statutory Basis

The Phlx believes that its proposal to amend its schedule of dues, fees and charges is consistent with section 6(b) of the Act⁸ and furthers the objectives of sections 6(b)(4) and 6(b)(5) of the Act.⁹ The Phlx believes that the proposed rule change would serve as an equitable allocation of reasonable fees among Phlx members because the 500 contract cap per individual cleared side of a transaction imposed in connection with the payment for order flow fee should lessen the economic burden on ROTs. Moreover, the Phlx believes that the 500 contract cap should attract more order flow to the Phlx, which should result in increased liquidity, tighter markets, and more competition among exchange members, thereby promoting just and equitable principles of trade, removing impediments to and perfect the

mechanism of a free and open market, and protecting investors and the public interest consistent with section 6(b)(5) of the Act.¹⁰

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

The Phlx 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 did not solicit or receive written comments concerning the proposal.

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

Within 35 days of the date 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, 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 Phlx. All submissions should refer to File No. SR-Phlx-2002-87 and should be submitted by June 27, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47953; File No. SR-Phlx-2003-16]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Notice of Filing and Order Accelerating Approval of Amendment No. 3 Thereto, by the Philadelphia Stock Exchange, Inc., Relating to a Pilot Program for Options Intermarket Linkage Fees

May 30, 2003.

On March 18, 2003, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change to amend its fee structure to clarify which fees apply to trades pertaining to the options intermarket linkage ("Linkage") and to specify that such fees are for a one-year pilot.³ On March 21, 2003, Phlx submitted Amendment No. 1 to the proposed rule change.⁴ The proposed rule change, as amended by Amendment No. 1, was originally published for comment in the **Federal Register** on April 2, 2003.⁵ On April 23, 2003, Phlx filed Amendment No. 2 to the proposed rule change.⁶ On April 23, 2003, Phlx filed a supplementary letter to Amendment No. 2.⁷ Amendment No. 2 was published for comment in the

contract cap. Accordingly, the 500 contract cap was in effect for only those trades executed on or after November 18 that settled through December 31, 2002.

⁶ The payment for order flow fee does not apply 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. Also, the payment for order flow fee does not apply to index or foreign currency options.

⁷ According to the Phlx, the imposition of a monetary cap has been implemented by other exchanges in connection with payment for order flow programs. See, e.g., Securities Exchange Act Release Nos. 45240 (January 7, 2002), 67 FR 1531 (January 11, 2002) (SR-PCX-2001-53) (implementing a ceiling on marketing charges of \$200 per trade); 46976 (December 9, 2002), 67 FR 77116 (December 16, 2002) (SR-ISE-2002-26) (lowering the cap on each payment for order flow fund from \$650,000 to \$550,000).

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(4) and 78f(b)(5).

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ 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 Richard S. Rudolph, Director and Counsel, Phlx to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated March 17, 2003 ("Original Filing").

⁴ See letter from Richard S. Rudolph, Director and Counsel, Phlx to Jennifer Lewis, Attorney, Division, Commission, dated March 20, 2003 ("Amendment No. 1").

⁵ See Securities Exchange Act Release No. 47561 (March 21, 2003), 68 FR 15250.

⁶ See letter from Richard S. Rudolph, Director and Counsel, Phlx to Jennifer Lewis, Attorney, Division, Commission, dated April 22, 2003 ("Amendment No. 2").

⁷ See letter from Richard S. Rudolph, Director and Counsel, Phlx to Jennifer Lewis, Attorney, Division, Commission, dated April 22, 2003.

Federal Register on May 5, 2003.⁸ The Commission received one comment on the proposal.⁹

On May 30, 2003, Phlx submitted Amendment No. 3 to the proposed rule change.¹⁰ Amendment No. 3 replaces Amendments No. 1 and 2 in their entirety.¹¹ This order approves the proposed rule change, and grants accelerated approval to Amendment No. 3. The Commission also solicits comment from interested persons on Amendment No. 3.

Pursuant to the Original Filing, Phlx proposed to charge Exchange members for orders for the principal account of market makers sent to the Exchange through the Linkage from the floor of another exchange ("P Orders") \$.35 per contract executed. In the Original Filing, Phlx stated that its proposed linkage fees were consistent with other fees charged by the Exchange for non-Linkage orders. In Amendment No. 2, Phlx explained that it had amended its fee schedule on April 11, 2003 to modify the fees applicable to broker/dealers for non-AUTO-X trades.¹² Previously, such fee was \$.35 per contract. Now, the fee ranges from \$.35 per contract to \$.20 per contract, depending on the number of contracts.¹³ In Amendment No. 2, Phlx clarified that due to this recent change, the proposed Linkage fee for P Orders would no longer be consistent with other fees charged by the Exchange for non-Linkage orders.

In the ISE Comment Letter, ISE argued that by charging more for Linkage access than for access through regular order-routing systems, the Phlx would be imposing inappropriate barriers to members of other exchanges.¹⁴ ISE also explained that the general consensus and understanding of the parties to the plan implementing the Linkage was that Linkage fees would be no greater than fees charged to professional traders

outside of Linkage and that the other four exchanges have proposed, and the Commission has approved, such limited fees for the other options exchanges.¹⁵ ISE further argued, "Phlx is the only exchange proposing to discourage use of the Linkage through its fee schedule. This will require members on the other exchanges to pay a premium for access to the efficiencies of Linkage," and would "result in 'unfair discrimination' on broker-dealer access."

In Amendment No. 3, Phlx proposes to amend its fee schedule to provide that P Orders would be subject to the same fees as non-Linkage non-AUTO-X broker-dealer orders. Therefore, the proposed fee for P Orders ranges from \$.35 per contract to \$.20 per contract, depending on the number of contracts.¹⁶ Phlx proposes that the fees applicable to P Orders would be implemented as a pilot, expiring on January 31, 2004.

The Commission finds that the proposed rule change, as amended by Amendment No. 3, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange¹⁷ and, in particular, the requirements of Section 6 of the Act.¹⁸ The Commission finds that the proposed rule change, as amended by Amendment No. 3, is consistent with Section 6(b)(4) of the Act,¹⁹ which requires that the rules of an exchange provide equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Commission believes the pilot will give the Exchange and the Commission the opportunity to evaluate whether these fees are appropriate.

The Commission finds good cause, consistent with Section 19(b)(2) of the Act,²⁰ to approve Amendment No. 3 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission notes that the issues addressed in the comment letter received in response to

Amendment No. 2 related to Phlx's proposal to charge higher fees for Linkage orders than for non-Linkage orders. In Amendment No. 3, Phlx revises its proposal to provide for fees for Linkage orders that would be consistent with fees for non-Linkage orders. Accordingly, the Commission believes good cause exists, pursuant to Sections 6(b)(5) and 19(b) of the Act²¹ to accelerate approval of Amendment No. 3 to the proposed rule change.

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 3, including whether it 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 Phlx. All submissions should refer to File No. SR-Phlx-2003-16 and should be submitted by June 27, 2003.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²² that the proposed rule change (SR-Phlx-2003-16), as amended, is approved on a pilot basis until January 31, 2004, and Amendment No. 3 is also approved on an accelerated basis until January 31, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²³

Margaret H. McFarland,
Deputy Secretary.

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SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

²¹ 15 U.S.C. 78f(b)(5) and 15 U.S.C. 78s(b).

²² 15 U.S.C. 78s(b)(2).

²³ 17 CFR 200.30-3(a)(12).

⁸ See Securities Exchange Act Release No. 47750 (April 28, 2003), 68 FR 23789.

⁹ See letter from Michael J. Simon, Senior Vice President and Secretary, International Securities Exchange, to Jonathan G. Katz, Secretary, Commission, dated May 27, 2003 ("ISE Comment Letter").

¹⁰ See letter from Richard S. Rudolph, Director and Counsel, Phlx to Jennifer Lewis, Attorney, Division, Commission, dated May 29, 2003.

¹¹ Telephone call between Richard S. Rudolph, Director and Counsel, Phlx, and Jennifer Lewis, Special Counsel, Division, Commission, on May 30, 2003.

¹² See Securities Exchange Act Release No. 47715 (April 23, 2003), 68 FR 22446 (April 28, 2003).

¹³ The fee is \$.35 per contract for up to 2,000 contracts, \$.25 per contract for between 2,001 and 3,000 contracts; and \$.20 per contract above 3,001 contracts (with the first 3,000 contracts charged \$.25 per contract).

¹⁴ See ISE Comment Letter, *supra* note 9.

¹⁵ See Securities Exchange Act Release Nos. 47719 (April 23, 2003), 68 FR 22764 (April 29, 2003) (File No. SR-ISE-2003-11); 47822 (May 9, 2003), 68 FR 27115 (May 19, 2003) (File No. SR-Amex-2003-14); 47761 (April 29, 2003), 68 FR 24042 (May 6, 2003) (File No. SR-CBOE-2003-11); and 47786 (May 2, 2003), 68 FR 24779 (May 8, 2003) (File No. SR-PCX-2003-08).

¹⁶ See *supra*, note 13.

¹⁷ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁸ 15 U.S.C. 78f.

¹⁹ 15 U.S.C. 78f(b)(4).

²⁰ 15 U.S.C. 78s(b)(2).