

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-49661; File No. SR-Phlx-2004-28)

May 6, 2004

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹, and Rule 19b-4 thereunder,² notice is hereby given that on April 23, 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 May 2004 through July 2004 for the top 120 equity options based on volume statistics from January, February and March 2004,³ as set forth on the ROT Equity

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 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 February 1, 2004 through April 30, 2004, for example, the measuring period for the top 120 equity options was based on volume statistics from October, November and December 2003. See Securities Exchange Act Release No. 49170 (February 2, 2004), 69 FR 6357 (February 10, 2004) (SR-Phlx-2004-05). For the payment for order flow fees

Option Payment for Order Flow Charges Schedule⁴ and subject to certain exceptions listed below. The Phlx intends to implement the payment for order flow fees for trades settling on or after May 1, 2004 through July 31, 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 120.⁵ The text of the proposed rule change is set forth below. Proposed new language is in *italics*; proposed deletions are in [brackets].

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**EXCHANGE'S ROT EQUITY OPTION
PAYMENT FOR ORDER FLOW CHARGES***

Underlying

Symbol	Company	Rate
AMAT	Applied Materials, Inc.	\$0.40

imposed on trades settling on or after May 1, 2004 through July 31, 2004, as set forth in this proposal, the measuring period for the top 120 equity options is based on volume statistics from January, February, and March 2004.

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

⁵ 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).

AMD	Advanced Micro Devices, Inc.	\$0.40
AMGN	Amgen, Inc.	\$0.40
AMZN	Amazon.com, Inc.	\$0.40
AMR	AMR Corporation	\$0.40
<u>AWE</u>	<u>AT&T Wireless Services Inc.</u>	<u>\$0.40</u>
BAC	Bank of America Corporation	\$0.40
[BBY	Best Buy Company Inc	\$0.40]
[BMY	Bristol-Meyers Squibb Company	\$0.40]
BRCM	Broadcom Corporation	\$0.40
[BSX	Boston Scientific Corporation	\$0.40]
C	Citigroup, Inc.	\$0.40
[CE	Concord E F S Inc.	\$0.40]
CPN	Calpine Corporation	\$0.40
CSCO	Cisco Systems, Inc.	\$0.40
DELL	Dell Computer Corp.	\$0.40
<u>DIS</u>	<u>The Walt Disney Company</u>	<u>\$0.40</u>
EBAY	eBay, Inc.	\$0.40
<u>ELN</u>	<u>Elan Corporation PLC</u>	<u>\$0.40</u>
EMC	EMC Corp	\$0.40
F	Ford Motor Company	\$0.40
GE	General Electric Company	\$0.40
[GM	General Motors Corporation	\$0.40]
HPQ	Hewlett-Packard Company	\$0.40

IBM	International Business Machines Corporation	\$0.40
INTC	Intel Corporation	\$0.40
<u>IWM</u>	<u>iShares Russell 200 Index Fund</u>	<u>\$0.40</u>
<u>JDSU</u>	<u>Juniper Networks, Inc.</u>	<u>\$0.40</u>
[JNJ	Johnson & Johnson	\$0.40]
<u>JNPR</u>	<u>Juniper Networks, Inc.</u>	<u>\$0.40</u>
JPM	Morgan & Chase Co. (J.P.)	\$0.40
[KLAC	KLA-Tencor Corporation	\$0.40]
LU	Lucent Technologies, Inc.	\$0.40
<u>MO</u>	<u>Philip Morris Companies, Inc.</u>	<u>\$0.40</u>
MOT	Motorola, Inc.	\$0.40
[MRK	Merck & Co., Inc.	\$0.40]
MSFT	Microsoft Corporation	\$0.40
MU	Micron Technology, Inc.	\$0.40
NEM	Newmont Mining Corp.	\$0.40
NOK	Nokia Corporation	\$0.40
<u>NT</u>	<u>Nortel Networks Corporation</u>	<u>\$0.40</u>
[NXTL	Nextel Communications Inc, Class A	\$0.40]
ORCL	Oracle Corporation	\$0.40
PFE	Pfizer, Inc.	\$0.40
<u>PSFT</u>	<u>PeopleSoft, Inc.</u>	<u>\$0.40</u>
QCOM	QUALCOMM, Inc.	\$0.40
QQQ	NASDAQ-100 Index Tracking Stock	\$1.00

<u>RIMM</u>	<u>Research in Motion Ltd.</u>	<u>\$0.40</u>
RMBS	Rambus, Inc.	\$0.40
<u>SBC</u>	<u>SBC Communications, Inc.</u>	<u>\$0.40</u>
SMH	Semiconductor HOLDRs	\$0.40
SNDK	SanDisk Corporation	\$0.40
SUNW	Sun Microsystems, Inc.	\$0.40
TWX	Time Warner, Inc.	\$0.40
TXN	Texas Instruments, Inc.	\$0.40
[TYC	Tyco International Ltd.	\$0.40]
[UPS	United Parcel Service, Inc.	\$0.40]
<u>VZ</u>	<u>Verizon Communications</u>	<u>\$0.40</u>
WMT	Wal-Mart Stores, Inc.	\$0.40
XMSR	XM Satellite Radio Holdings, Inc.	\$0.40
[XOM	Exxon Mobil Corporation	\$0.40]
YHOO	Yahoo!, Inc.	\$0.40

*Subject to a 500 contract cap, per individual cleared side of a transaction

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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.

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

According to the Phlx, the Exchange reinstated its payment for order flow program in November, 2002.⁶ 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.⁷ 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 May 1, 2004 through July 31, 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

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

⁷ 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.

that the proposal is consistent with Section 6(b) of the Act⁸ and furthers the objectives of Section 6(b)(4) of the Act⁹.

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.

II. 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 Act¹⁰ and Rule 19b-4(f)(2)¹¹ 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. Comments may be submitted by any of the following methods:

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(4).

¹⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

¹¹ 17 CFR 240.19b-4(f)(2).

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. Please include File Number SR-Phlx-2004-28 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-Phlx-2004-28. 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 Reference Section, 450 Fifth Street, NW, Washington, DC 20549-0609. Copies of such filing also will be available for inspection and copying at the principal office of the Phlx. 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-Phlx-2004-28 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland
Deputy Secretary

¹² 17 CFR 200.30-3(a)(12).