

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50572; File No. SR-Phlx-2004-61)

October 20, 2004

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to its Equity Options Payment for Order Flow Program

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 September 22, 2004, the Philadelphia Stock Exchange, Inc. (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission” or “SEC”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and at the same time is granting accelerated approval of the proposed rule change.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to modify the Exchange’s equity options payment for order flow program for trades settling on or after September 1, 2004 through September 21, 2004. In addition, the Exchange proposes to amend its equity options payment for order flow program as it relates to the reimbursement of equity options payment for order flow funds, which was in effect for trades settling on or after August 2, 2004 through August 31, 2004.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Equity Options Payment for Order Flow Program Commencing September 22, 2004

The Exchange recently amended its equity options payment for order flow program.³ Pursuant to that program, for trades settling on or after September 22, 2004, the Exchange will assess a payment for order flow fee as follows when Registered Options Traders (“ROTs”) trade against a customer order: (1) \$1.00 per contract for options on the Nasdaq-100 Index Tracking StockSM traded under the symbol QQQ, currently the most actively traded equity option;⁴ and (2) \$0.40 per contract for the remaining top 150 equity options, other than the QQQ.⁵ The payment for order flow fee

³ See Securities Exchange Act Release No. 50471 (September 29, 2004), 69 FR 59636 (October 5, 2004) (SR-Phlx-2004-60) (“Release 34-50471”).

⁴ QQQ is currently the most actively-traded equity option. The Nasdaq-100®, Nasdaq-100 Index®, Nasdaq®, The Nasdaq Stock Market®, Nasdaq-100 SharesSM, Nasdaq-100 TrustSM, Nasdaq-100 Index Tracking StockSM, and QQQSM are trademarks or service marks of The Nasdaq Stock Market, Inc. (“Nasdaq”) and have been licensed for use for certain purposes by the Phlx pursuant to a License Agreement with Nasdaq. The Nasdaq-100 Index® (“Index”) is determined, composed, and calculated by Nasdaq without regard to the Licensee, the Nasdaq-100 TrustSM, or the beneficial owners of Nasdaq-100 SharesSM. Nasdaq has complete control and sole discretion in determining, comprising, or calculating the Index or in modifying in any way its method for determining, comprising, or calculating the Index in the future.

⁵ The top 150 options are calculated based on the 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 (“OCC”) and that are also traded on the Exchange. For example, if two of the most actively traded equity options, based on volume statistics provided by the OCC are not traded on the Exchange, then the next two most actively traded equity options that are traded on the Exchange will be selected. (For example, if the list of the top 150 options includes two options that are not traded on the Exchange, then the options ranked 151 and 152 will be included in the Exchange’s top 150, assuming those options are traded on the Exchange). The measuring periods for the top 150 options are calculated every three months. For example, for trade months September, October and November, the measuring period to determine the top 150 options will be based on volume statistics from May, June and July. This cycle will continue every three months. Members will be notified of the top 150 options approximately two weeks before the beginning of a new three-month trading period. As discussed below, the payment for order flow fees are incurred

applies, in effect, to equity option transactions between a ROT and a customer.⁶ In addition, a 500 contract cap per individual cleared side of a transaction is imposed.⁷

Specialist units⁸ elect to participate or not to participate in the program in all options in which they are acting as a specialist by notifying the Exchange in writing no later than five business days prior to the start of the month.⁹ If a specialist unit elects not

only when the specialist elects to participate in the equity options payment for order flow program. The Exchange's fee schedule reflects the fee of \$1.00 for options on the QQQ and \$0.40 for the remaining top 150 equity options, other than options on the QQQ. Any change to the rate at which the equity options payment for order flow fee is assessed would be the subject of a separate proposed rule change filed with the Commission.

⁶ Thus, consistent with current practice, the ROT payment for order flow fee is not assessed on transactions between: (1) a specialist and a ROT; (2) a ROT and a ROT; (3) a ROT and a firm; and (4) a ROT and a broker-dealer. The ROT payment for order flow fee does not apply to index options or foreign currency options. Accordingly, the ROT payment for order flow fees applies, in effect, to equity option transactions between a ROT and a customer.

⁷ Under the Exchange's equity options 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 is 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 equally divided 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 Nos. 47958 (May 30, 2003), 68 FR 34026 (June 6, 2003) (proposing SR-Phlx-2002-87); and 48166 (July 11, 2003), 68 FR 42450 (July 17, 2003) (approving SR-Phlx-2002-87). See also Release 34-50471.

⁸ The terms "specialist" and "specialist unit" are used interchangeably herein.

⁹ A specialist unit must notify the Exchange in writing to either elect to participate or not to participate in the program. Once a specialist unit has either elected to participate or not to participate in the Exchange's equity options payment for order flow program in a particular month, it is not required to notify the Exchange in a subsequent month, as described above, if it does not intend to change its participation status. For example, if a specialist unit elected to participate in the program and provided the Exchange with the appropriate notice, that specialist unit would not be required to notify the Exchange in the subsequent month(s) if it

to participate in the program, that specialist unit waives its right to any reimbursement of payment for order flow funds for the month(s) during which it elected to opt out of the program.¹⁰

Specialists request payment for order flow reimbursements on an option-by-option basis. The collected funds are used by each specialist unit to reimburse it for monies expended to attract options orders to the Exchange by making payments to order flow providers who provide order flow to the Exchange. They receive their respective funds only after submitting an Exchange certification form identifying the amount of the requested funds.¹¹ Each specialist unit establishes the amounts that will be paid to order flow providers.

Pursuant to the Exchange's current equity options payment for order flow program, any excess payment for order flow funds are carried forward to the next month by option and may not be applied retroactively to past deficits, which may be incurred

intends to continue to participate in the program. However, if it elects not to participate (a change from its current status), it would need to notify the Exchange in accordance with the requirements stated above.

¹⁰ For any month (or part of a month where an option is allocated mid-month) the specialist unit has elected to opt out of the program, no ROT payment for order flow fee will apply.

¹¹ While all determinations concerning the amount that will be paid for orders and which order flow providers shall receive these payments will be made by the specialists, the specialists will provide to the Exchange on an Exchange form certain information, including what firms they paid for order flow, the amount of the payment, and the price paid per contract. The purpose of the form, in part, is to assist the Exchange in determining the effectiveness of the proposed fee and to account for and track the funds transferred to specialists, consistent with normal bookkeeping and auditing practices. In addition, certain administrative duties will be provided by the Exchange to assist the specialists.

when the specialist requests more than the amount collected.¹² Thus, excess funds will not be rebated to ROTs except in the limited situation discussed below, nor will deficits carry forward to subsequent months. ROTs may, however, receive a rebate of excess funds in a particular option for a particular month if the specialist unit does not request reimbursement by option of at least 50% of the total amount of payment for order flow funds billed to and collected from ROTs for each option in which that specialist unit is acting as specialist, as more fully described below.¹³

Specialists units may opt out entirely from the program as long as they notify the Exchange in writing by the 15th of the month, or the next business day if the 15th of the month is not a business day. If a specialist unit opts out of the program by the 15th of the month, no payment for order flow charges will be incurred for either the specialist unit or ROTs for transactions in the affected options for that month.

In addition to opting out entirely from the program, specialists may opt out of the program on an option-by-option basis if they notify the Exchange in writing no later than three business days after the end of the month (which is before the payment for order flow fee is billed). If a specialist unit opts out of an option at the end of the month, then no payment for order flow fees will be assessed on the applicable ROT(s) for that option.

If a specialist unit opts out of the program in a particular option more than two times in a

¹² Specialists may not receive more than the payment for order flow amount billed and collected in a given month; however, the amounts specialists receive may include excesses, if any, for that option, carried forward from prior months, up to the payment for order flow amount billed and collected in such month. Telephone conversation between Cynthia K. Hoekstra, Counsel, Phlx, and David Liu, Attorney, Division, Commission, on September 24, 2004.

¹³ The Exchange will periodically review its equity options payment for order flow program to determine whether a cap on the amount collected for each option should be imposed in the future. Any such cap would have to be filed with the Commission as a proposed rule change under Section 19(b)(1) of the Act.

six-month period, it will be precluded from entering into the payment for order flow program for that option for the next three months.

If a specialist unit opts into the program (and does not opt out of the program entirely by the 15th day of the month or by option by the third business day after the end of the month) and does not request reimbursement by option of at least 50% of the total amount of payment for order flow funds billed to and collected from ROTs for each option in which that specialist unit is acting as the specialist, then any excess payment for order flow funds remaining after the specialist has been reimbursed will be rebated, on a pro rata basis, to the affected ROTs for those particular options in which the 50% threshold was not met.¹⁴

The payment for order flow fee is billed and collected on a monthly basis. Because the specialists are not being charged the payment for order flow fee for their own transactions, they may not request reimbursement for order flow funds in connection with any transactions to which they were a party.¹⁵

¹⁴ For example, if a specialist unit requests \$10,000 in reimbursement for one option and the total amount billed and collected from the ROTs was \$30,000, then the specialist unit did not satisfy the 50% threshold, given the fact that it did not request reimbursement of at least \$15,000. Therefore, the remaining amount of \$20,000 will be rebated to the ROTs on a pro rata basis. If ROT A was assessed \$15,000 in payment for order flow fees, he would receive a rebate of \$10,000 ($\$15,000/\$30,000 = 50\%$ and 50% of \$20,000 is \$10,000). If ROT B was assessed \$8,000 in payment for order flow fees, it would receive \$5,333.33, which represents 26.67% ($\$8,000/\$30,000$) of \$20,000. If ROT C was assessed \$7,000 in payment for order flow fees, it would receive \$4,666.67, which represents 23.33% ($\$7,000/\$30,000$) of \$20,000.

¹⁵ The amount a specialist may receive in reimbursement is limited to the percentage of ROT monthly volume to total specialist and ROT monthly volume in the equity options payment for order flow program. For example, if a specialist unit has a payment for order flow arrangement with an order flow provider to pay that order flow provider \$0.70 per contract for order flow routed to the Exchange and that order flow provider sends 90,000 customer contracts to the Exchange in one

The Exchange may audit a specialist's payments to payment-accepting firms to verify the use and accuracy of the payment for order flow funds remitted to the specialists based on their certification.¹⁶

The Exchange continues to implement a quality of execution program.¹⁷

The payment for order flow fees as set forth in this proposal would be in effect for trades settling on or after September 1, 2004 through September 21, 2004.

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 its proposal and discussed any comments it received on the proposal. The text of these statements may be examined at the places specified in Item III below. The Phlx has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

month for one option, then the specialist would be required, pursuant to its agreement with the order flow provider, to pay the order flow provider \$63,000 for that month. Assuming that the 90,000 represents 30,000 specialist transactions, 20,000 ROT transactions and 40,000 transactions from firms, broker-dealers and other customers, the specialist may request reimbursement of up to 40% (20,000/50,000) of the amount paid (\$63,000 x 40%=\$25,200). However, because the ROTs will have paid \$8,000 into the payment for order flow fund for that month, the specialist may collect only \$8,000 (20,000 contracts x \$0.40 per contract) of its \$25,200 reimbursement request plus, if applicable, any excess funds for that particular option carried over from a prior month up to the specialist's \$25,200 reimbursement request.

¹⁶ See Exchange Rule 760.

¹⁷ See, e.g., Securities Exchange Act Release No. 43436 (October 11, 2000), 65 FR 63281 (October 23, 2000) (SR-Phlx-00-83).

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 implement the current equity options payment for order flow program for trades settling on or after September 1, 2004 through September 21, 2004,¹⁸ and to adopt changes to the reimbursement request process in effect for trades setting on or after August 2, 2004 through August 31, 2004. The Phlx believes that implementing a consistent equity options payment for order flow program for the month of September should minimize member confusion. In addition, requiring specialists to request reimbursement for payment for order flow funds on an option-by-option basis and rebating any excess funds collected but not reimbursed to specialists to the affected ROTs would provide for a method of distributing those funds collected under the August equity options payment for order flow program, which is no longer in effect.¹⁹

¹⁸ The Exchange represents that its members were notified of modifications to the Exchange's equity options payment for order flow program in memoranda sent to members and member organizations on August 9, 2004, September 1, 2004, September 7, 2004, and September 8, 2004.

¹⁹ SR-Phlx-2004-50 was filed with the Commission on July 29, 2004 and subsequently amended on August 16, 2004. SR-Phlx-2004-56 was filed with the Commission on August 16, 2004. SR-Phlx-2004-50 and SR-Phlx-2004-56 were both abrogated by the Commission. See Securities Exchange Act Release No. 50420 (September 22, 2004), 69 FR 58007 (September 28, 2004) ("Abrogation Order"). SR-Phlx-2004-50, as amended, modified the Phlx's fee schedule to assess an equity options payment for order flow fee as follows when ROTs trade against a customer order by: (1) assessing a \$1.00 per contract (for options on the QQQ) and \$0.35 per contract (for all equity options other than options on the QQQ); (2) permitting specialists to opt in or out of the program by notifying the Exchange in writing at least five business days prior to the start of the month; and (3) combining the payment for order flow fees collected from ROTs in one account to form a "pool" from which specialists may request reimbursement for the amounts that they pay to order flow providers to send order

The Exchange believes that adopting the proposed equity options payment for order flow program should allow the Exchange to implement a more competitive equity options payment for order flow program. Equity options payment for order flow programs are in place at each of the other options exchanges. The Phlx states that the revenue generated by the \$1.00 or \$0.40 payment for order flow fees, as outlined in this proposal, is intended to be used by specialist units to compete for order flow in equity options listed for trading on the Exchange. The Exchange believes that, in today's competitive environment, changing its equity options payment for order flow program to compete more directly with other options exchanges is important and appropriate.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of dues, fees and charges is consistent with Section 6(b) of the Act²⁰ in general, and furthers the objectives of Section 6(b)(4) of the Act²¹ in particular, in that it is an equitable allocation of reasonable fees among Phlx members and that it is designed to enable the Exchange to compete with other markets in attracting customer order flow. Because the equity options payment for order flow fees are collected only from member organizations respecting customer transactions, the Phlx believes that there is a direct and fair

flow to the Exchange. SR-Phlx-2004-56 amended the Phlx's fees schedule to revise its equity options payment for order flow program by (1) requiring a specialist unit to pay equity option payment for order flow fees in a given month at the same rate as ROTs, if the specialist unit elects to participate in the program and does not pay at least 50% of the total amount of equity options payment for order flow funds collected from ROTs in the options for which that specialist unit is acting as the specialist; and (2) providing that specialist units may opt out of the equity options payment for order flow program, as long as they notify the Exchange in writing by the 15th day of the month.

²⁰ 15 U.S.C. 78f(b).

²¹ 15 U.S.C. 78f(b)(4).

correlation between those members who fund the equity options payment for order flow fee program and those who receive the benefits of the program. The Exchange states that ROTs also potentially benefit from additional customer order flow. In addition, the Phlx believes that the proposed payment for order flow fees would serve to enhance the competitiveness of the Phlx and its members and that this proposal therefore is consistent with and furthers the objectives of the Act, including Section 6(b)(5) thereof,²² which requires the rules of exchanges to be designed to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Phlx believes that attracting more order flow to the Exchange should, in turn, result in increased liquidity, tighter markets and more competition 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

The Phlx states that no written comments were either solicited or received.²³

III. 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:

²² 15 U.S.C. 78f(b)(5).

²³ Previously, in connection with SR-Phlx-2004-50, the Exchange received one written comment letter, dated August 10, 2004, which was forwarded to the Commission on August 20, 2004.

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-2004-61 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-2004-61. 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 Room. Copies of the 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-2004-61 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.²⁴ Specifically, the Commission believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,²⁵ which requires that the rules of the Exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

On July 29, 2004²⁶ and August 16, 2004,²⁷ the Exchange filed proposed rule changes with the Commission, which were immediately effective,²⁸ relating to the Exchange's equity options payment for order flow program for trades settling on or after August 2, 2004. On September 22, 2004, the Commission summarily abrogated these proposed rule changes.²⁹ On that same day, the Exchange filed a proposed rule change, which was immediately effective, that implemented a new payment for order flow

²⁴ The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

²⁵ 15 U.S.C. 78f(b)(4).

²⁶ See SR-Phlx-2004-50.

²⁷ See SR-Phlx-2004-56.

²⁸ 15 U.S.C. 78s(b)(3)(A).

²⁹ See Abrogation Order, supra note 19. Under Section 19(b)(3)(C) of the Act, any proposed rule change that has taken effect pursuant to Section 19(b)(3)(A) of the Act may be enforced to the extent it is not inconsistent with the Act, the rules and regulations thereunder, and applicable federal and state law. 15 U.S.C. 78s(b)(3)(C).

program for trades settling on or after September 22, 2004.³⁰ Because, under Section 19(b)(3)(C) of the Act,³¹ the Abrogation Order does not affect the validity or force of the proposed rule changes filed on July 29, 2004,³² and August 16, 2004³³ during the period that they were in effect (i.e., for trades settling on or after August 2, 2004 through September 21, 2004), this proposed rule change would modify the Exchange's equity options payment for order flow program that was in effect for trades settling on or after September 1, 2004 through September 21, 2004 to be consistent with the equity options payment for order flow program that has been in effect as of September 22, 2004.

The Exchange also proposes to permit specialists to request reimbursement for payment for order flow funds on an option-by-option basis and to rebate to the affected ROTs any excess funds collected, but not distributed to, specialists for trades settling on or after August 2, 2004 through August 30, 2004.

The Commission believes that the Exchange's proposal to modify its equity options payment for order flow program that was in effect immediately preceding the Abrogation Order would provide for a uniform program for the month of September 2004 and thus would reduce confusion and promote consistency with respect to the application of its payment for order flow program for trades settling during the month of September 2004. The Commission further believes that the Exchange's proposal to provide a method for distributing payment for order flow fees, on an option-by-option basis, for trades settling during August 2004 and for rebating any excess fees that were collected

³⁰ See Securities Exchange Act Release No. 50471 (September 29, 2004), 69 FR 59636 (October 5, 2004) (SR-Phlx-2004-60).

³¹ 15 U.S.C. 78s(b)(3)(C).

³² See SR-Phlx-2004-50.

³³ See SR-Phlx-2004-56.

but not distributed would provide an appropriate method for handling fees collected under the equity options payment for order flow program that was in effect for August 2004, but was later summarily abrogated by the Commission.³⁴ Therefore, the Commission finds that there is good cause, consistent with Section 19(b)(2) of the Act,³⁵ to approve the proposed rule change prior to the 30th day of the date of publication of notice of filing thereof in the Federal Register.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³⁶ that the proposed rule change (File No. SR-Phlx-2004-61) be approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.³⁷

J. Lynn Taylor
Assistant Secretary

³⁴ See Abrogation Order, supra note 19.

³⁵ 15 U.S.C. 78s(b)(2).

³⁶ 15 U.S.C. 78s(b)(2).

³⁷ 17 CFR 200.30-3(a)(12).