

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50836; File No. SR-Phlx-2004-70)

December 10, 2004

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto to Impose New License Fees and to Modify the Calculation of the Firm-Related Equity Option and Index Option Fee Cap

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 November 1, 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 December 9, 2004, Phlx filed Amendment 1 to the proposed rule change.³ Phlx filed this proposal pursuant to Section 19(b)(3)(A)(ii)⁴ of the Act and Rule 19b-4(f)(2)⁵ thereunder as a proposal establishing or changing a due, fee, or other charge imposed by the self-regulatory organization, which renders the proposal effective upon

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, the Phlx made minor technical changes; clarified the calculation of the \$50,000 cap (described below), specifically as it relates to the firm-related equity option and index option comparison and transaction charges for products without license fees and with license fees; and further clarified that applicable firm-related charges for the QCX, QCE, and FXI will not be counted towards the \$50,000 cap. For purpose of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers that period to commence on December 9, 2004, the date that the Phlx filed Amendment No. 1.

⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

⁵ 17 CFR 240.19b-4(f)(2).

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 Phlx proposes to adopt various license fees to be assessed per contract side for equity option "firm" transactions (comprised of equity option firm/proprietary comparison transactions, equity option firm/proprietary transactions and firm/proprietary facilitation transactions). These license fees will be imposed after the Exchange's \$50,000 "firm-related" equity option and index option comparison and transaction fee cap, described more fully below, is reached. In addition, the Exchange proposes to impose the normal (not fixed) firm-related equity option and index option comparison and transaction fees, if applicable, for certain options, which would not be subject to the \$50,000 cap. The Exchange also proposes to make a minor change to its Summary of Equity Option Charges fee schedule.

The text of the proposed rule change is available at 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 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 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

Current Fee Structure

Currently, the Exchange imposes a cap of \$50,000 per member organization⁶ on all “firm-related” equity option and index option comparison and transaction charges combined. Specifically, such “firm-related” charges include equity option firm/proprietary comparison charges, equity option firm/proprietary transaction charges, equity option firm/proprietary facilitation transaction charges, index option firm (proprietary and customer executions) comparison charges, index option firm/proprietary transaction charges, and index option firm/proprietary facilitation transaction charges (collectively “firm-related charges”).⁷ Thus, such firm-related charges for equity options and index options, in the aggregate for one billing month, may not exceed \$50,000 per month per member organization.

⁶ The firm/proprietary comparison or transaction charge applies to member organizations for orders for the proprietary account of any member or non-member broker-dealer that derives more than 35% of its annual, gross revenues from commissions and principal transactions with customers. Member organizations will be required to verify this amount to the Exchange by certifying that they have reached this threshold by submitting a copy of their annual report, which was prepared in accordance with Generally Accepted Accounting Principles (“GAAP”). In the event that a member organization has not been in business for one year, the most recent quarterly reports, prepared in accordance with GAAP, will be accepted. See Securities Exchange Act Release No. 43558 (November 14, 2000), 65 FR 69984 (November 21, 2000) (SR-Phlx-00-85).

⁷ On October 28, 2004, the Exchange submitted a proposed rule change to the Securities and Exchange Commission (“Commission”) to delineate two separate “firm” charges on the Summary of Index Option and FXI Option Charges fee schedule: firm/proprietary and firm/proprietary facilitation, to be more consistent with the reference to the firm transaction charges on the Exchange’s Summary of Equity Option Charges. See Securities Exchange Act Release No. 50679 (November 16, 2004), 69 FR 68208 (November 23, 2004) (SR-Phlx-2004-69).

The Exchange also imposes a license fee of \$0.10 per contract side for equity option “firm” transactions on options on Nasdaq-100 Index Tracking Stock^{sm 8} traded under the symbol QQQ (“QQQ”) after the \$50,000 cap, as described above, is reached. Therefore, when a member organization exceeds the \$50,000 cap (comprised of combined firm-related charges), the member organization is charged \$50,000, plus the QQQ license fee of \$0.10 per contract side for any QQQ trades (if any) over those that were included in reaching the \$50,000 cap. In other words, the \$0.10 license fee is imposed in addition to the \$50,000 cap, if the cap is reached, on firm-related transactions.

Proposed Changes to the \$50,000 Firm Related Equity Option and Index Option Cap Proposed Fixed Fee Program

The Exchange proposes to adopt the specific license fees per contract side for the following products for equity option firm transactions, which will be imposed after the \$50,000 cap is reached:

<u>Product</u>	<u>License Fee Per Contract Side</u>
Russell 1000 Growth iShares (“IWF”)	\$0.10
Russell 2000 iShares (“IWM”)	\$0.10
Russell 2000 Value iShares (“IWN”)	\$0.10
Russell 2000 Growth iShares (“IWO”)	\$0.10
Russell Midcap Growth iShares (“IWP”)	\$0.10

⁸ 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® (the “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.

Russell Midcap Value iShares (“IWS”)	\$0.10
NYSE Composite Index (“NYC”)	\$0.10
NYSE U.S. 100 Index (“NY”)	\$0.10

Thus, when a member organization exceeds the \$50,000 cap, the member organization will be charged \$50,000 plus any applicable license fees listed above (as well as QQQ license fees) for any trades over those trades that were included in reaching the \$50,000 cap.⁹

In addition, the Exchange proposes to impose the normal (not fixed) firm-related charges for the following three options: Full-size index options (“QCX”) and Mini index options (“QCE”) on the Nasdaq Composite Index, Inc.®¹⁰ and options listed on the iShares FTSE/Xinhua China 25 Index Fund (“FXI Options”),¹¹ an exchange-traded fund. Thus, a member organization will be charged the applicable firm-related charges for the QCX, QCE or FXI, regardless of whether the \$50,000 cap described above is reached, and these charges will not be counted towards the \$50,000 cap.

The fees set forth in this proposal are scheduled to become effective for transactions settling on or after November 1, 2004.

⁹ Consistent with current practice, when calculating the \$50,000 cap, the Exchange first calculates all equity option and index option transaction and comparison charges for products without license fees and then equity option transaction and comparison charges for products with license fees (i.e., QQQ license fees) that are assessed by the Exchange after the \$50,000 cap is reached. See Securities Exchange Act Release No. 48459 (September 8, 2003), 68 FR 54034 (September 15, 2003) (SR-Phlx-2003-61, Exhibit 3).

¹⁰ The Nasdaq Composite Index® is a registered trademark of The Nasdaq Stock Market, Inc., and is licensed for use by Phlx.

¹¹ The Exchange began listing FXI Options, a product that is an equity option, on October 19, 2004, but are assessed fees pursuant to the Summary of Index Option and FXI Options Charges. See Securities Exchange Act Release No. 50676 (November 16, 2004), 69 FR 38206 (November 23, 2004) (SR-Phlx-2004-67).

The purpose of assessing the various license fees per contract side after reaching the \$50,000 cap as described in this proposal is to help defray licensing costs associated with the trading of these products, while still capping member organizations' fees enough to attract volume from other exchanges. The purpose of allowing the QCE, QCX and FXI products to be charged the normal (not fixed) firm-related charges is to generate revenue (that was previously capped) because these are not the products in which the Exchange is seeking to attract firm-related volume from other exchanges.

In addition to the foregoing, the Exchange proposes to make a minor change to its Summary of Equity Option Charges to delete the word "transaction" from the reference to the firm/proprietary facilitation option transaction charge and to delete reference to the QQQ license fees of \$0.10 per contract side from the Summary of Index Option and FXI Options Charges, as this language is unnecessary.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act¹² in general, and furthers the objectives of Section 6(b)(4) of the Act¹³ in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among Exchange members and issuers and other persons using its facilities.

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(4).

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

No written comments were either solicited or received.

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

The foregoing proposal has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act¹⁴ and Rule 19b-4(f)(2)¹⁵ thereunder as a proposal establishing or changing a due, fee, or other charge imposed by the self-regulatory organization. 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.¹⁶

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. Comments may be submitted by any of the following methods:

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-2004-70 on the subject line.

¹⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁵ 17 CFR 240.19b-4(f)(2).

¹⁶ See supra note 3.

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-2004-70. 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 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-2004-70 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.¹⁷

J. Lynn Taylor
Assistant Secretary

¹⁷ 17 CFR 200.30-3(a)(12).