

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-53068; File No. SR-Phlx-2005-87)

January 6, 2006

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change, and Amendment No. 1 Thereto Relating to the Exchange's Covered Sale Fee and Exchange Rule 607

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 December 23, 2005, 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. On January 4, 2006, the Exchange filed Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons, and is approving the amended proposal on an accelerated basis.

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

The Phlx proposes to change the title from the "SEC Fee" to "Covered Sale Fee" as it appears on the Exchange's Summary of Equity Charges and the Nasdaq-100 Index Tracking StockSM Fee Schedule ("Fee Schedule").⁴ The Exchange also proposes to amend Exchange Rule

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 made technical changes to the proposed rule text.

⁴ 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

607 to clarify the description of the Covered Sale Fee, including renaming the title of Phlx Rule 607 to “Covered Sale Fee” and providing a more complete description of a new arrangement for passing fees among Intermarket Trading System (“ITS”) participants. Below is the text of the proposed rule change, as amended. Proposed new language is underlined; proposed deletions are in brackets.

Rule 607.

[Transaction] Covered Sale Fee

Under Section 31 of the Securities Exchange Act of 1934, the Exchange must pay certain fees to the Securities and Exchange Commission ("Commission"). To help fund the Exchange's obligations to the Commission under Section 31, a Covered Sale Fee is assessed by the Exchange to members and member organizations. To the extent there may be any excess monies collected under this Rule, the Exchange may retain those monies to help fund its general operating expenses. [Every member and member organization shall pay to the Exchange in such manner and at such time as the Exchange shall direct, the fees specified in Section 31 of the Securities Exchange Act of 1934, and rules thereunder, for all sales upon the Exchange of securities specified in Section 31 of the Securities Exchange Act of 1934, and rules thereunder.]

Each member and member organization engaged in executing sale transactions on the Exchange or executing transactions, which were routed over the Intermarket Trading System, on another exchange during any computational period shall pay a Covered Sale Fee equal to (i) the Section 31 fee rate multiplied by (ii) the member's aggregate dollar amount of covered sales.

determining, comprising, or calculating the Index or in modifying in any way its method for determining, comprising, or calculating the Index in the future.

The Exchange may enter into arrangements with other exchanges to pass the Covered Sale Fee among the applicable exchanges where the Exchange has collected the Covered Sale Fee from its members and member organizations for sale transactions executed on another exchange through the Intermarket Trading System and when other exchanges have collected the Covered Sale Fee from its members for sale transactions executed on the Exchange through the Intermarket Trading System.

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SUMMARY OF EQUITY CHARGES (p 2/3)*

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[SEC FEE] Covered Sale Fee

[The amount shall be determined by Section 31 of the Securities Exchange Act of 1934.]

Each member and member organization engaged in executing sale transactions on the Exchange or executing transactions, which were routed over the Intermarket Trading System, on another exchange during any computational period shall pay a Covered Sale Fee equal to (i) the Section 31 fee rate multiplied by (ii) the member's aggregate dollar amount of covered sales.

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NASDAQ-100 INDEX TRACKING STOCKSM FEE SCHEDULE

PHLX FEE SCHEDULE

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[SEC FEE] Covered Sale Fee

[The amount shall be determined by Section 31 of the Securities Exchange Act of 1934.]

Each member and member organization engaged in executing sale transactions on the Exchange or executing transactions, which were routed over the Intermarket Trading System, on

another exchange during any computational period shall pay a Covered Sale Fee equal to (i) the Section 31 fee rate multiplied by (ii) the member's aggregate dollar amount of covered sales.

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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 Exchange included statements concerning the purpose of, and basis for, the proposed rule change, as amended, and discussed any comments it received on the proposed rule change, as amended. The text of these statements may be examined at the places specified in Item III 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 changing the name of the "SEC Fee" as it appears on the Exchange's fee schedule and in Phlx Rule 607 is to conform with the Commission's request to rename this fee to help clarify that members and member organizations do not incur an obligation to the Commission under Section 31 of the Act and to help minimize confusion in connection with the Exchange's assessment of the fee. In addition, the amendments to Rule 607 reflect the new arrangements with respect to the passing of fees among ITS participants that each collects from its respective members for transactions executed on another SRO through ITS.

Background

In late June 2004, the Commission established new procedures governing the calculation, payment, and collection of fees and assessments on securities transactions owed by national securities exchanges and national securities associations (collectively "SROs") to the

Commission pursuant to Section 31 of the Act.⁵ In connection with these new procedures, the Commission expressed its concern about the manner in which SROs labeled the fees that they passed to their members and the manner in which members labeled the fees passed to their customers. Because Section 31 does not place an obligation on members of covered SROs or their customers, the Commission stated its belief that it is misleading to suggest that a customer or an SRO member incurred an obligation to the Commission under Section 31. Accordingly, the Commission requested that SROs take action to correct any such misperception, which would include changing the title of the “SEC Fee” as it appears on the Exchange’s fee schedule.

Thus, in order to comply with the Commission’s request and to minimize any confusion relating to the assessment of the fee, the Exchange proposes to rename its “SEC Fee” and Phlx Rule 607 “Transaction Fee” to “Covered Sale Fee.”⁶

ITS Collection

In addition, the Exchange recently filed with, and received an SEC order granting accelerated approval from, the Commission to enter into arrangements with other participating SROs to pass certain fees they have collected from members for transactions executed on another exchange through the ITS.⁷ Participating SROs have entered into an arrangement to pass fees among ITS participants that each participating SRO has collected from its members for sale transactions executed on another participating SRO through ITS. Pursuant to this new

⁵ See Securities Exchange Act Release No. 49928 (June 28, 2004), 69 FR 41060 (July 7, 2004).

⁶ Pursuant to Rule 31 under the Act, 17 CFR 240.31, a covered sale is a sale of a security, other than an exempt sale or a sale of a security future, occurring on a national securities exchange or by or through any member of a national securities association otherwise than on a national securities exchange.

⁷ See Securities Exchange Act Release No. 52745 (November 7, 2005), 70 FR 69182, (November 14, 2005) (SR-Phlx-2005-64).

arrangement, each ITS participant will determine whether it has received and executed more in dollar value of covered sales than it has originated and sent to each other ITS participant.⁸ One participating SRO will then deduct the amount it owes another participating SRO and will invoice only for the difference; however, the duty to report and pay the Section 31 fee will remain with the ITS participant SRO on which the sale was in fact transacted. It is anticipated that the invoicing process will occur twice yearly to coincide with the March 15 and September 30 payment schedule for Section 31 fees set forth in the Act.

NSCC Collection and Computational Period

The Exchange intends to have the National Securities Clearing Corporation (“NSCC”) collect this fee (and other Exchange fees) for the Exchange for certain members and member organizations and pay over to the Exchange the funds collected in connection with equity transactions, which should increase the efficiency in which this fee, as well as other Exchange fees, are collected.⁹ Further, the Exchange intends to have the Options Clearing Corporation (“OCC”) continue to bill and collect this fee in connection with covered sales of options.¹⁰

⁸ For example, for the period September 2003 through August 2004, SRO A sent ITS commitments for covered sales whose dollar value was \$150 million to SRO B for execution. SRO A collected fees from its members to fund its Section 31 obligation for those covered sales executed on SRO B. Under the new procedures established by the Commission for the calculation and collection of Section 31 fees on such covered sales, SRO B, as the executing market center, is obligated to pay the Section 31 fee to the Commission.

⁹ Currently, NSCC collects the fee on the 23rd calendar day of each month, provided that if such day is other than an NSCC business/settlement day, on the next succeeding NSCC business/settlement day. The Exchange implemented this collection practice in November 2005, which covered transactions that occurred in October 2005. For equity transactions, the NSCC debits the Phlx member’s or member organization’s clearing firm. If an Exchange member clears through the Stock Clearing Corporation of Philadelphia (“SCCP”), a Phlx subsidiary, the Exchange will debit the member’s or member organizations’ margin account at SCCP.

¹⁰ Currently, OCC and the options exchanges, including the Phlx, have established arrangements whereby OCC tabulates the aggregate amount of sales of options that occur

The computational period, referred to in proposed Rule 607 above, may change during the course of a year if there is a change in the Section 31 fee rate.¹¹ Thus, the amount of the Section 31 fee may change during the year, which would, in turn, start a new computational period. The Exchange determines whether a trade “occurs” before or after a fee rate change so that the appropriate dollar amounts of securities sales are multiplied by the correct fee rate.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with and furthers the objective of Section 6(b)(4) of the Act,¹² which requires that the rules of an exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

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

The Exchange does not believe that the proposed rule change, as amended, 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 solicited or received with respect to the proposed rule change, as amended.

on the exchanges, based on data captured by OCC’s systems. OCC then calculates the Section 31 fees owed by the exchanges and, in turn, remits to the Commission the Section 31 fees on behalf of these exchanges.

¹¹ The Commission is required to adjust the securities transaction fee rates on an annual basis, after consultation with the Congressional Budget Office and the Office of Management and Budget. The Commission may also be required to make a “mid-year” adjustment to the Section 31 fee rate.

¹² 15 U.S.C. 78f(b)(4).

III. 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-2005-87 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-Phlx-2005-87. 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, as amended, 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-2005-87 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 a Proposed Rule Change and Amendment No.1 Thereo

The Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.¹³ In particular, the Commission believes that the proposal is consistent with Section 6(b)(4) of the Act,¹⁴ which requires that the rules of an exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers, and other persons using its facilities.

Under Section 19(b)(2) of the Act,¹⁵ the Commission may not approve any proposed rule change prior to the thirtieth day after the date of publication of the notice of filing thereof, unless the Commission finds good cause for so doing. The Commission hereby finds good cause for approving the proposed rule change, as amended, prior to the thirtieth day after publishing notice of filing thereof in the Federal Register. The Commission believes that such action is consistent with the protection of investors and the public interest. This proposal will make the Exchange's rules consistent with the Commission's guidance on Section 31 without undue delay. The proposal also codifies the current Exchange arrangement for passing the Covered Sale Fees between the ITS participants. Therefore, the Commission believes that proposed rule change, as

¹³ In approving this proposal, as amended, the Commission has considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁴ 15 U.S.C. 78f(b)(4).

¹⁵ 15 U.S.C. 78s(b)(2).

amended, raises no new regulatory issues and that a full notice-and-comment period is not necessary.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁶ that the proposed rule change, as amended (SR-Phlx-2005-87), is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Nancy M. Morris
Secretary

¹⁶ Id.

¹⁷ 17 CFR 200.30-3(a)(12).