

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-54941; File No. SR-Phlx-2006-70)

December 14, 2006

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto To Adopt Fees for the Trading of Equity Securities on XLE

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 2, 2006, 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 Phlx. On December 12, 2006, the Exchange filed Amendment No. 1 to the proposed rule change.³ The Exchange has designated this amended proposal as one establishing or changing a due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A),⁴ and Rule 19b-4(f)(2) thereunder,⁵ which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Partial Amendment No. 1, which supplemented the proposal as originally filed, the Exchange made several clarifying changes to further explain the assessment of the proposed fees in connection with its new equity trading system and made other technical changes to the original filing. In addition, the Exchange included a revised Exhibit 5A in Partial Amendment No. 1 to reflect technical and clarifying changes made therein, which, for clarity and ease of reference, replaces the Exhibit 5A contained in the original filing. The Exchange did not propose any new fees in Partial Amendment No. 1.

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ 17 CFR 240.19b-4(f)(2).

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

The Phlx proposes to adopt the proposed fees described below for the trading of equity securities on the Exchange in connection with its new equity system (“XLE”).⁶ With XLE, the Exchange no longer operates a physical trading floor for equity securities or the Philadelphia Stock Exchange Automated Communication and Execution (“PACE”) system.⁷ Therefore, the Exchange proposes to adopt a new fee schedule to accommodate the trading of equity securities on XLE and to amend Appendix A of the Exchange’s fee schedule to adopt XLE-related fees, delete obsolete fees, and modify other fees that will no longer apply to equity trading.⁸ The text of the proposed rule change is available on the Phlx’s Web site at <http://www.phlx.com>, at the Phlx’s Office of the Secretary, and at the Commission’s Public Reference Room.⁹

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

In its filing with the Commission, Phlx included statements concerning the purpose of, and basis for, the proposed rule change 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. Phlx has

⁶ XLE is designed to provide the opportunity for entirely automated executions to occur within a central matching system accessible by Exchange members and member organizations and their Sponsored Participants. See Securities Exchange Act Release No. 54538 (September 28, 2006), 71 FR 59184 (October 6, 2006) (SR-Phlx-2006-43).

⁷ PACE was the Exchange’s order routing, delivery, execution and reporting system for its equity trading floor. The Commission notes that XLE commenced limited operations on November 10, 2006.

⁸ Although the fees proposed herein have been filed to become immediately effective, the fees will not become operative until the Exchange discontinues its physical equities trading floor and commences operation of XLE. See Securities Exchange Act Release No. 54538 (September 28, 2006), 71 FR 59184 (October 6, 2006) (SR-Phlx-2006-43) (order approving XLE rules). The Commission notes that XLE commenced limited operations on November 10, 2006.

⁹ The Stock Clearing Corporation of Philadelphia (“SCCP”) filed a separate proposed rule change with the Commission to amend its fee schedule to reflect fees associated with the trade processing of equity securities through SCCP in connection with XLE. See SR-SCCP-2006-04.

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 the proposed rule change is to adopt a fee schedule for the trading of equity securities on the Exchange in connection with XLE. The XLE fee schedule includes transaction fees (execution and routing fees), covered sale fees, and system fees, as well as a market data revenue sharing proposal. Changes to Appendix A of the Exchange’s fee schedule include permit fees, application fees, and a modified examination fee, as well as the deletion of certain floor-based fees. All the proposed fees will be assessed on Exchange members or member organizations, which may include Sponsoring Member Organizations,¹⁰ (collectively referred to herein as “member organizations”). Sponsoring Member Organizations are responsible for the fees generated by their Sponsored Participant’s activities.

Transaction Fees

With respect to securities trading at or above \$1.00, the Exchange intends to charge member organizations an execution fee, ranging from \$0.0026 to \$0.003 per share, depending on the number of total shares executed monthly,¹¹ for orders that remove liquidity from XLE.

¹⁰ A Sponsoring Member Organization is a member organization that has authorized access to XLE for a Sponsored Participant (a person who has access to XLE which is authorized by a Sponsoring Member Organization). See Phlx Rules 1(jj) and 1(kk).

¹¹ The “total monthly shares” executed includes executions resulting from removing and providing liquidity on XLE and crosses executed on XLE, as well as shares executed when routed via XLE to an away trading center and executed on that away trading center, except for liquidity provided by incoming NMS Linkage Orders or ITS Commitments. The total monthly shares will be calculated separately per XLE Participant Organization, which, for purposes of this proposal, refers to Sponsored Participants, Sponsoring Member Organizations, and member organizations without Sponsored Participants. Thus, Sponsored Participant activity will accrete towards that Sponsored Participant’s volume tier and not towards the Sponsoring Member Organization’s

Additionally, the Exchange intends to offer an execution credit to member organizations, ranging from \$0.002 to \$0.0026 per share, for orders that provide liquidity to XLE. Any available credits would be applied to the member organization's monthly invoice. Excess credits would be carried over into subsequent months or rebated to the applicable member organization, as requested by the member organization.

The purpose of adopting the volume tiers in connection with the assessment of transaction fees is to encourage XLE Participant Organizations to send and execute orders on XLE. The volume tiers are based on the monthly shares executed per XLE Participant Organization; for Tier 1 (less than or equal to 10 million shares executed), the Exchange proposes to assess a fee of \$0.003 per share executed to remove liquidity and give a credit of \$0.002 per share executed for providing liquidity; for Tier 2 (greater than 10 million and less than or equal to 50 million shares executed), the Exchange proposes to assess a fee of \$0.0028 per share executed to remove liquidity and give a credit of \$0.0025 per share executed for providing liquidity; for Tier 3 (greater than 50 million and less than or equal to 200 million shares executed), the Exchange proposes to assess a fee of \$0.0027 per share executed to remove liquidity and give a credit of \$0.0026 per share executed for providing liquidity; and for Tier 4 (greater than 200 million shares executed), the Exchange proposes to assess a fee of \$0.0026 per share executed to remove liquidity and give a credit of \$0.0026 per share executed for providing liquidity. For each of the four volume tiers described above, the Exchange proposes to charge a flat routing fee of \$0.0036 per share executed when an order is routed via XLE to an away trading center and executed on that away trading center.

volume tier. Once a specific tier has been reached in a month, all transactions for that month will be subject to the fee that corresponds with that volume tier. See also infra notes 15 and 16.

In addition, in lieu of the above-referenced execution fees, the Exchange proposes to adopt a separate execution fee for securities executed on XLE at a per share price below \$1.00 that remove liquidity. For these securities, the Exchange would charge 0.1% (i.e., 10 basis points) of the total dollar value of the transaction. The Exchange is not proposing an execution fee credit for providing liquidity for shares with a per share price below \$1.00. Such executed volume for securities trading below \$1.00 will accrete towards the volume tier breakpoint per XLE Participant Organization.

Additional transaction fees are set forth on the proposed fee schedule under the heading “Miscellaneous Transaction Fees.” Miscellaneous Transaction Fees would be assessed in lieu of the general transaction fees described above. The Exchange proposes to adopt an execution fee of \$0.0023 per share per side for Immediate or Cancel (“IOC”) Cross Orders and Mid-Point Cross Orders entered over technology provided by Phlx.¹² The Exchange is not proposing to adopt any transaction fees (i.e., execution fee for removing liquidity or execution credit for providing liquidity) for executions of IOC Cross Orders¹³ and Mid-Point Cross Orders¹⁴ with respect to orders entered over technology that is not provided by the Exchange. There also would be no execution credit for any IOC Cross or Mid-Point Cross transactions, whether

¹² Phlx intends to provide optional technology to XLE Participants for the entry of two-sided orders into XLE.

¹³ IOC Cross Orders are two-sided orders that match immediately and automatically on XLE the identified buy-side with the identified sell-side. Specifically, an IOC Cross Order is a two-sided order that executes, in its entirety, at the specified price, provided that XLE will cancel an IOC Cross Order at the time of order entry under certain conditions. See Phlx Rules 185(c) and 185(c)(2).

¹⁴ A Mid-Point Cross Order is a two-sided order that executes, in its entirety, at the midpoint of the best Protected Bid and the best Protected Offer in a security. These orders will match immediately and automatically on XLE the identified buy-side with the identified sell-side. See Phlx Rules 185(c) and 185(c)(1).

entered over technology provided by Phlx or not.¹⁵ In addition, in connection with IOC Cross Orders and Mid-Point Cross Orders entered over technology provided by Phlx, there would be a \$50 maximum fee per trade side.

The execution fee for Odd Lot Orders¹⁶ would be \$0.003 per share executed, which applies to orders initially entered as Odd Lot Orders and executed in XLE. There would be no execution credit for orders initially entered as Odd Lot Orders and executed on XLE. Also, for incoming NMS Linkage Orders or ITS Commitments routed to Phlx and executed on XLE, the Exchange proposes to charge \$0.003 per share for removing liquidity.¹⁷ The Exchange is proposing to delete from its Summary of Equity Charges the Outbound ITS fee and Net Inbound ITS Credit, since the Exchange will no longer assess an Outbound ITS fee or give a Net Inbound ITS Credit.

Covered Sale Fee

The Exchange will continue to charge a Covered Sale Fee. Each member and member organization engaged in executing sale transactions on the Exchange or executing transactions, which were routed over the Intermarket Trading System or pursuant to the NMS Linkage Plan,

¹⁵ Executed volume for IOC Cross and Mid-Point Cross Orders, whether entered over technology provided by the Exchange or not, will accrete towards the volume tier breakpoint per XLE Participant Organization that is a party to the execution.

¹⁶ An Odd Lot Order means an order for less than a round lot, which is defined for purposes of XLE as a unit of trading that is 100 shares. See Phlx Rules 1(w) and 1(gg). Executed volume for orders initially entered as Odd Lot Orders and executed on XLE will accrete towards the volume tier breakpoint per XLE Participant Organization.

¹⁷ This fee will be assessed on the member organization sponsoring the NMS Linkage Order or ITS Commitment or, if there is no member organization sponsoring the NMS Linkage Order or ITS Commitment, on the exchange or the Participant in the National Association of Securities Dealers, Inc. Alternative Display Facility (“ADF Participant”) sending the ITS Commitment or NMS Linkage Order. The arrangement to charge other exchanges or ADF Participants was part of separate proposed rule changes that were approved by the Commission. See Securities Exchange Act Release Nos. 54548 (September 29, 2006), 71 FR 59159 (October 6, 2006) (SR-Phlx-2006-58) and 54555 (October 2, 2006), 71 FR 59577 (October 10, 2006) (SR-Phlx-2006-60).

on another exchange or on a Participant in NASD's Alternative Display Facility 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.¹⁸

System Fees

The Exchange proposes to charge a monthly FIX¹⁹ Computer-to-Computer Interface (CTCI) Port Fee²⁰ of \$100.00 per port. At this time, however, the Exchange does not intend to charge for monthly Drop Copy Feeds,²¹ Monthly Phlx Systems,²² or Depth of Book Data Feeds.²³

Marketing Data Revenue Sharing

In addition, the Exchange is proposing to adopt a quarterly market data revenue sharing program that would provide for 50% of gross market data revenue to be shared with the member organization responsible for providing the liquidity portion of the trade. Sponsored Participant trades will be credited to the applicable Sponsoring Member Organization. Any market data revenue would be paid to the applicable member organization on a quarterly basis.

¹⁸ See Phlx Rule 607 and Securities Exchange Act Release No. 54555 (October 2, 2006), 71 FR 59577 (October 10, 2006) (SR-Phlx-2006-60) (amending Phlx Rule 607). See also Partial Amendment No. 1, *supra* note 3 (making conforming edits to the Covered Sale Fee rule text to reflect the amended version of Phlx Rule 607). A Sponsoring Member Organization is responsible for the Covered Sale Fees generated in connection with its Sponsored Participant's sale transactions.

¹⁹ The Financial Information eXchange ("FIX") Protocol is a messaging standard developed specifically for the real-time electronic exchange of securities transactions.

²⁰ A port is defined as an Internet Protocol ("IP") address assigned by the Exchange for connectivity to XLE.

²¹ The Drop Copy Feed provides real-time information concerning trades executed by an XLE Participant Organization and will be provided on a subscription basis.

²² The Monthly Phlx Systems Fee refers to the use of optional Phlx technology to enter in two-sided orders and related clearing information.

²³ The Depth of Book feed displays every order, except the undisplayed portion of a Reserve Order, within XLE at each price level and will be provided, on a subscription basis, at no charge to anyone who subscribes to receive this information.

The market data revenue sharing will apply to all securities: Tape A, Tape B, and Tape C. Although there is a difference in the manner in which the underlying Tape A and Tape B, revenue versus Tape C revenue is distributed to Phlx and the other national securities exchanges²⁴ there is no difference in the manner in which member organizations will share in Tape A and B revenue versus Tape C revenue because the proposed rule language bases the credits on revenue attributable to the executions of a member organization. Thus, a member organization responsible for providing the liquidity portion of the trade will receive 50% of the revenue attributable to its executions reported to each of the three tapes.²⁵

Deleting Obsolete Fees

In connection with adopting the XLE fee schedule for the trading of equity securities on the Exchange, the Exchange proposes to delete the obsolete fees currently listed on the Summary of Equity Charges,²⁶ which includes deleting references to license fees assessed in connection with the trading of certain products. Although the Exchange may currently, or in the future, be a party to a license fee agreement with a licensor in connection with the trading of certain products, the Exchange does not propose to assess license fees in connection with XLE at this time. The Exchange would submit a separate proposed rule change if it decides to assess license fees in the future.

²⁴ Tape A and Tape B revenue is currently distributed to Phlx and national securities exchanges based on the number of trades reported, while Tape C revenue is distributed based on an average of number of trades and number of shares reported.

²⁵ The Exchange states that the proposed market data revenue sharing program is similar to programs implemented by other self-regulatory organizations. See, e.g., Securities Exchange Act Release No. 53860 (May 24, 2006), 71 FR 31250 (June 1, 2006) (SR-NSX-2006-07).

²⁶ The Covered Sale Fee, however, will continue to be assessed in connection with XLE.

The Exchange also proposes to delete references to SCCP customer and specialist fees on the Exchange's Nasdaq-100 Index Tracking StockSM Fee Schedule²⁷ to reflect changes that were proposed in a separate SCCP fee filing.²⁸

Appendix A

Appendix A of the Exchange's fee schedule contains general fees that are currently assessed on members, foreign currency options ("FCO") participants, member organizations, or FCO participant organizations that are not transaction-based, such that many of the fees relate to gaining access to trading on the Exchange or being physically present on the trading floor. As set forth below, the Exchange intends to adopt, modify, or delete, as appropriate, several fees to accommodate the trading of equity securities on XLE.

The Exchange proposes to adopt permit fees related to the trading of equity securities on XLE. Currently, the Exchange assesses a permit fee to access trading on the Exchange. Permit fees are assessed based on how each permit is used. Specifically, the Exchange will charge an Order Flow Provider a permit fee of \$200 per month to submit orders to XLE only and \$300 per month to submit orders to more than one trading venue (*i.e.*, XLE, foreign currency options trading floor, or options trading floor). Members who are registered as Market Maker Authorized Traders²⁹ will be charged \$1,200 per month for the first permit and \$1,000 per month

²⁷ The Nasdaq-100®, Nasdaq-100 Index®, Nasdaq®, The Nasdaq Stock Market®, Nasdaq-100 Shares,SM Nasdaq-100 Trust,SM Nasdaq-100 Index Tracking Stock,SM 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 Philadelphia Stock Exchange 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 Trust,SM or the beneficial owners of Nasdaq-100 Shares.SM 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.

²⁸ See SR-SCCP-2006-04.

²⁹ The term "Market Maker Authorized Trader" means a Participant Authorized User who is a member and who performs market making activities pursuant to Phlx Rules 170 *et. seq.* A

for each additional permit for members in the same member organization. If a member organization only sponsors a Sponsored Participant and does not have any other trading functions, the permit holder associated with that member organization will be charged a permit fee of \$1,200 per month and \$1,000 per month for additional permits for members in the same member organization.

The permit fees will be assessed consistent with current practices. For example, any member who is associated with one or more member organizations and uses a permit in more than one category will pay the higher of the applicable fees each month for such permit.³⁰ In addition, permits may not be transferred from one permit holder associated with one member organization to a permit holder associated with a different member organization, thus a Transfer Fee is inapplicable for permits relating to XLE trading.³¹

Excess permit fees³² will continue to apply, but will be expanded to include XLE users. Therefore, permit holders may be designated as “excess” permit holders in cases where permit holders in the same organization, other than the permit holder who qualifies the member organization, are either: (1) not floor brokers, specialists, ROTs (including RSQTs and SQTs), Off-Floor Traders, Market Maker Authorized Traders, or an XLE Sponsoring Member Organization whose only function is to sponsor a Sponsored Participant; or (2) not associated with a member organization that meets the definition of an Order Flow Provider, which now

Participant Authorized User means an individual authorized by a member organization or a Sponsored Participant to enter orders, on its behalf, on XLE. See Phlx Rules 1(m) and 1(x).

³⁰ See Securities Exchange Act Release No. 49157 (January 30, 2004), 69 FR 5883 (February 6, 2004) (SR-Phlx-2004-02).

³¹ Permits, however, may be transferred within a member organization without incurring a Transfer Fee. See Securities Exchange Act Release No. 49157 (January 30, 2004), 69 FR 5883 (February 6, 2004) (SR-Phlx-2004-02).

³² See Securities Exchange Act Release Nos. 49856 (June 15, 2004), 69 FR 34411 (June 21, 2004) (SR-Phlx-2004-32) and 53043 (December 29, 2005), 71 FR 959 (January 6, 2006) (SR-Phlx-2005-72).

includes submitting orders to XLE. The rate remains unchanged. Thus, member organizations that have excess permit holders will continue to be assessed \$200 for each “excess” permit.

The Exchange also proposes to charge Sponsoring Member Organizations an application fee of \$1,850.00 for each Sponsored Participant that it proposes to sponsor to help offset the costs associated with the processing of the application, including administrative costs associated with reviewing the application and creating the appropriate accounts.³³

The Account Fee also will continue to apply to member organizations that trade on XLE. Currently, the Exchange charges member organizations a monthly fee of \$50.00 for each account beyond the number of permits billed to that member organization.³⁴ Therefore, if a member organization sponsors a Sponsored Participant and establishes a new account, each account beyond the number of permits billed to that member organization would be subject to the \$50.00 fee.

In addition, any equity floor-based fees, such as post and booth space fees, would no longer apply to members or member organizations due to the fact that there will no longer be a physical equity trading floor.³⁵ The Exchange will not assess these equity floor-based fees for

³³ This fee is the same amount as the Exchange’s current application (\$350.00) and initiation fees (\$1,500) combined for members and member organizations.

³⁴ Each account may have 22 suffixes or sub-accounts. For example, account number 202 can actually be used as accounts 202-A, 202-B, etc. There is no additional charge for suffixes assigned within the same account. See Securities Exchange Act Release No. 53046 (January 3, 2006), 71 FR 1459 (January 9, 2006) (SR-Phlx-2005-89).

³⁵ Examples of these floor-based fees include trading post/booth space, controller space, floor facility, direct wire to the floor, telephone system line extension, trading floor personnel registration, computer equipment services, repairs or replacements, and computer relocation requests. These fees will remain on Appendix A to reflect that they will still be assessed on members, participants, and member or participant organizations on the options and/or foreign currency options trading floors.

any part of the month in which XLE is launched.³⁶ These fees will remain on the fee schedule as applicable to the Exchange's other trading floors.

The Exchange proposes to delete from the fee schedule any fees applicable only to the equity trading floor, such as the stock execution machine registration fee, due to the fact that there will no longer be a physical equity trading floor. Additionally, the Exchange proposes to delete all Remote Specialist fees,³⁷ since Remote Specialists will not exist in XLE.

Apart from the launch of XLE and merely to update the fee schedule, the Exchange also proposes to delete the "Equity, Option or FCO Transmission Charge" and the "FCO Pricing Tape" fees because the Exchange will no longer be providing these services. Thus, a charge for these services will not be assessed.

The Exchange also proposes to delete its Off-Floor Examinations Fee of \$30.00 per month per off-floor trader and, in turn, amend its Examinations Fee. The implementation of a tiered monthly Examinations Fee will replace the Off-Floor Examinations Fee. Currently, the Exchange assesses a monthly fee of \$30.00 per off-floor trader for off-floor traders associated with member organizations for whom the Exchange is the Designated Examining Authority ("DEA").³⁸ With the closing of the Exchange's equity trading floor, traders that previously physically traded on the floor of the Exchange (and for whom the Exchange was the DEA for their member organization) will no longer be considered "on-floor traders," but will now be

³⁶ For example, if XLE is launched in mid-November, no equity floor-based fees from Appendix A will be assessed for the month of November.

³⁷ Specifically, these fees include the Remote Specialist System Fee, Remote Specialist Security Routing Fee, Remote Specialist Telecommunications Installation Fee, Remote Specialist Telecommunications Fee, Remote Specialist Equipment Installation Fee, and Remote Specialist Equipment Rental Fee.

³⁸ See Securities Exchange Act Release No. 53643 (April 13, 2006), 71 FR 20151 (April 19, 2006) (SR-Phlx-2006-23).

designated as “off-floor traders” and therefore would now fall under and be assessed the Off-Floor Examinations Fee.³⁹

To address the unintended consequences that XLE would now cover additional traders that previously were not covered under the Off-Floor Examinations Fee, the Exchange is proposing to delete the Off-Floor Examinations Fee and adopt a tiered Examinations Fee based on the number of off-floor traders in a member organization.⁴⁰ Specifically, a member organization will be assessed a monthly fee of \$2,100 for one to ten off-floor traders; \$2,600 for eleven to fifty off-floor traders; \$5,000 for fifty-one to two hundred off-floor traders; and \$12,500 for over two hundred off-floor traders in the same member organization. The following member organizations will continue to be exempt from the Examinations Fee, consistent with current practice: (1) inactive organizations;⁴¹ and (2) organizations operating through one or more Phlx trading venues that demonstrated that 25% or more of its revenue as reflected on the most recently submitted FOCUS Report or transactions as reflected on its purchase and sales blotter are derived from securities transactions on the Phlx. The Exchange proposes to eliminate the following exemptions to clarify and simplify the application of the Examinations Fee: (1) the exemption category for member organizations for any month where they incur transaction or clearing fees charged directly by the Exchange or by its registered clearing subsidiary, provided

³⁹ The Examinations Fee is applicable to member/participant organizations for whom the Exchange is the DEA, unless an exemption to the assessment of the Examinations Fee applies. See, e.g., Securities Exchange Act Release Nos. 46392 (August 21, 2002), 67 FR 55294 (August 28, 2002) (SR-Phlx-2002-45) and 42562 (March 22, 2000), 65 FR 16445 (March 28, 2000) (SR-Phlx-00-18).

⁴⁰ For purposes of assessing the proposed tiered Examinations Fee, Sponsored Participants are not included in the calculation of the number of off-floor traders in a Sponsoring Member Organization.

⁴¹ In connection with amending the Examinations Fee as described above, the definition of an inactive organization is being modified slightly so that it will be defined as an organization that had no securities transaction revenue, as determined by FOCUS reports or other financial filings, as long as the organization continues to have no such revenue each month.

that the fees exceed the examination fee for that month and (2) the exemption for member organizations affiliated with a member organization exempt from the Examination Fee due to the exemption listed immediately above or the exemption if that member organization is affiliated with a member organization operating from the Phlx trading floor or as a Remote Specialist which have demonstrated that at least 25 % or more of their income as reflected on the most recently submitted FOCUS Report was derived from floor activities or remote specialist activities.

The proposed revised Examinations Fee, which would apply to many of the members currently covered by the Off-Floor Examinations Fee, should more efficiently and effectively assess member organizations for recovery of regulatory-related costs related to conducting examinations and should clarify how the Examinations Fee will be assessed in connection with the member organizations that trade equity securities on XLE.⁴²

Finally, the Exchange proposes to renumber the footnotes on the Exchange's fee schedule to reflect the changes described above.

2. Statutory Basis

The Phlx believes that the proposed rule change to amend its schedule of fees is consistent with Section 6(b) of the Act,⁴³ in general, and furthers the objectives of Section 6(b)(4) of the Act,⁴⁴ in particular, in that it is designed to assure the equitable allocation of reasonable fees and other charges among its members and other persons using its facilities.

⁴² The proposed Examinations Fee would be implemented the first full month after XLE is launched. For example, if XLE is launched in mid-November, the current off-floor Examinations Fee will apply for the month of November and the Examinations Fee set forth in this proposal would be assessed beginning with the month of December.

⁴³ 15 U.S.C. 78f(b).

⁴⁴ 15 U.S.C. 78f(b)(4).

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

The Phlx 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 solicited or received with respect to the proposed rule change.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act⁴⁵ and subparagraph (f)(2) of Rule 19b-4 thereunder,⁴⁶ since it establishes or changes a due, fee or other charge imposed by the Exchange.

At any time within 60 days of the filing of such 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 the furtherance of the purposes of the Act.⁴⁷

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:

⁴⁵ 15 U.S.C. 78s(b)(3)(A).

⁴⁶ 17 CFR 240.19b-4(f)(2).

⁴⁷ The effective date of the original proposed rule change is November 2, 2006 and the effective date of Amendment No. 1 is December 12, 2006. For purposes 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 the period to commence on December 12, 2006 the date on which Phlx filed Amendment No. 1. See 15 U.S.C. 78s(b)(3)(C).

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-2006-70 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2006-70. 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 No. SR-Phlx-2006-70 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁴⁸

Florence E. Harmon
Deputy Secretary

⁴⁸ 17 CFR 200.30-3(a)(12).