

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-50276; File No. SR-PHLX-2004-55)

August 26, 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 NASDAQ-100 Index Tracking Stock<sup>SM</sup> Equity Transaction Charges

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 13, 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 retroactively apply its amended schedule of fees and charges to replace the tiered equity transaction charges with a single per share charge for equity transactions from July 1, 2004 through July 30, 2004<sup>3</sup> in NASDAQ-100 Index Tracking

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> The Exchange filed a proposed rule change, Securities Exchange Act Release No. 50106 (July 28, 2004), 69 FR 47197 (August 4, 2004) (SR-PHLX-2004-40), which amended the Summary of Equity Charges portion of the fee schedule by replacing the total shares per transaction charge with a single per share charge. The NASDAQ-100 Index Tracking Stock<sup>SM</sup> fee schedule, which contains a duplicate tiered fee schedule as contained in the Summary of Equity Charges, was inadvertently omitted from that filing. This filing seeks to amend the replicated tiered fee schedule which is displayed in the NASDAQ-100 Index Tracking Stock<sup>SM</sup> in the same fashion as it was amended in the Summary of Equity Charges

Stock<sup>SM</sup> (known as QQQ<sup>SM</sup>).<sup>4</sup> Below is the text of the proposed rule change. Proposed new language is in italics; deletions are in brackets.

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## NASDAQ-100 INDEX TRACKING STOCK<sup>SM</sup> FEE SCHEDULE

### PHLX FEE SCHEDULE

#### Customer

PACE	none <sup>5</sup>
Non-PACE	
Transaction [Charge] Fee	<u>\$.0035 per share</u>
[FIRST 500 shares]	\$0.00
[Next 2,000 shares]	\$0.0075
[Remaining shares]	\$0.005]

\$50 maximum fee per trade side.

<sup>5</sup> However, this charge applies where an order, after being delivered to the Exchange by the PACE system is executed by the specialist by way of an outbound ITS commitment, when such outbound ITS commitment reflects the PACE order's clearing information, but does not apply where a PACE trade was executed against an inbound ITS commitment.

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portion of the fee schedule for the period July 1 through July 30, 2004. The Exchange has filed a proposed rule change, SR-PHLX-2004-52, designated as effective upon filing, to cover QQQ<sup>SM</sup> transactions on or after August 2, 2004. See Securities Exchange Act Release No. 50174 (August 10, 2004), 69 FR 51137 (August 17, 2004).

<sup>4</sup> Nasdaq-100®, Nasdaq-100 Index®, Nasdaq®, The Nasdaq Stock Market®, Nasdaq-100 Shares<sup>SM</sup>, Nasdaq-100 Trust<sup>SM</sup>, Nasdaq-100 Index Tracking Stock<sup>SM</sup> and QQQ<sup>SM</sup> 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® ("Index") is determined, composed and calculated by Nasdaq without regard to the Licensee, the Nasdaq-100 Trust<sup>SM</sup>, or the beneficial owners of Nasdaq-100 Shares<sup>SM</sup>. 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.

**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.

**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 remain competitive and foster growth of the equity floor brokerage business by seeking to increase volume. This proposal seeks to retroactively replace the current tiered fee schedule for non-PACE NASDAQ-100 Index Tracking Stock<sup>SM</sup> trades with a single per share charge of \$.0035, subject to a cap of \$50 per trade side for equity transactions traded from July 1, 2004 through July 30, 2004.<sup>5</sup> Previously, the tiered fee schedule was based on total shares per transaction. Recently, the Exchange's other equity transaction charges, with the exception of the NASDAQ-100 Index Tracking Stock<sup>SM</sup>, were replaced with a single per share charge of \$.0035.<sup>6</sup>

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<sup>5</sup> However, this charge applies where an order, after being delivered to the Exchange by the PACE system is executed by the specialist by way of an outbound ITS commitment, when such outbound ITS commitment reflects the PACE order's clearing information, but does not apply where a PACE trade was executed against an inbound ITS commitment. See footnote 5 of the NASDAQ-100 Index Tracking Stock<sup>SM</sup> Fee Schedule.

<sup>6</sup> The exclusion of the NASDAQ-100 Index Tracking Stock<sup>SM</sup> was inadvertent. See supra footnote 3.

For trades prior to August 2, 2004, the NASDAQ-100 Index Tracking Stock<sup>SM</sup> used the same tiered fee schedule as was previously present in the Summary of Equity Charges fee schedule.<sup>7</sup> For example, for the first 500 shares the transaction fee is \$0, for the next 2,000 shares the transaction fee is \$.0075 on a per share basis, and thereafter, for any remaining shares the transaction fee is \$.005 on a per share basis. This proposal would amend the fee schedule to a single per share charge of \$.0035 for such transactions traded from July 1, 2004 through July 30, 2004, thereby conforming the fees to the Summary of Equity Charges, which were likewise amended to reflect this change.<sup>8</sup>

In addition, the term “charge” is being replaced with the term “fee” for the purpose of clarity.

## 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 Act<sup>9</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>10</sup> in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among Exchange members and would allow the equity floor to remain competitive and encourage growth.

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<sup>7</sup> The fee is charged only to members of the Phlx. Telephone conversation between Angela Saccomandi Dunn, Counsel, Phlx, and David Liu, Attorney, Division of Market Regulation (“Division”), Commission, on August 20, 2004. See Securities Exchange Act Release Nos. 50106 (July 28, 2004), 69 FR 47197 (August 4, 2004) (SR-PHLX-2004-40); and 50174 (August 10, 2004), 69 FR 51137 (August 17, 2004) (SR-PHLX-2004-52).

<sup>8</sup> Telephone conversation between Angela Saccomandi Dunn, Counsel, Phlx, and David Liu, Attorney, Division, Commission, on August 20, 2004. See Securities Exchange Act Release No. 50106 (July 28, 2004), 69 FR 47197 (August 4, 2004) (SR-Phlx-2004-40).

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 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

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

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:

Electronic comments:

- Use the Commission's Internet comment form  
[\(<http://www.sec.gov/rules/sro.shtml>\)](http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-PHLX-2004-55 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-2004-55. 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-2004-55 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 as a Pilot Program

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.<sup>11</sup> Specifically, the Commission believes the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>12</sup> 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.

The Commission notes that this proposal, which permits the retroactive application of non-PACE NASDAQ-100 Index Tracking Stock<sup>SM</sup> equity transaction charges to the period from July 1, 2004 through July 30, 2004, reflects a change to the

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<sup>11</sup> The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>12</sup> 15 U.S.C. 78f(b)(4).

Phlx fee schedule which was inadvertently omitted from the filing exhibit of SR-PHLX-2004-40.<sup>13</sup> Further, the Commission notes that the Phlx states that the Exchange membership was provided with adequate notification of this fee amendment.

The Commission finds good cause for approving the proposed rule change prior to the 30<sup>th</sup> day of the date of publication of notice of filing thereof in the Federal Register. The Commission notes that the proposed charges are substantially similar to those in SR-PHLX-2004-40, relating to equity transaction charges generally, and SR-PHLX-2004-52, relating to non-PACE NASDAQ-100 Index Tracking Stock<sup>SM</sup> equity transaction charges specifically, both filings of which were immediately effective upon filing and which, as of August 24, 2004, have not received any comments regarding the proposed transaction charges.<sup>14</sup> In addition, except for the first 500 shares of a transaction, the proposed charges would lower fees charged for non-PACE NASDAQ-100 Index Tracking Stock<sup>SM</sup> transactions. Finally, the Commission notes that this change will promote consistency in the Exchange's fee schedule by conforming the non-PACE NASDAQ-100 Index Tracking Stock<sup>SM</sup> equity transaction charge to the Phlx's equity transaction charges generally for the period from July 1, 2004 through July 30, 2004. Therefore, the Commission finds that there is good cause, consistent with Section 19(b)(2) of the Act,<sup>15</sup> to approve the proposed rule change on an accelerated basis.

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<sup>13</sup> See Securities Exchange Act Release No. 50106 (July 28, 2004), 69 FR 47197 (August 4, 2004) (SR-PHLX-2004-40).

<sup>14</sup> See Securities Exchange Act Release Nos. 50106 (July 28, 2004), 69 FR 47197 (August 4, 2004) (SR-PHLX-2004-40); and 50174 (August 10, 2004), 69 FR 51137 (August 17, 2004) (SR-PHLX-2004-52).

<sup>15</sup> 15 U.S.C. 78s(b)(2).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>16</sup> that the proposed rule change (File No. SR-PHLX-2004-55) be approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>17</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>16</sup> 15 U.S.C. 78s(b)(2).

<sup>17</sup> 17 CFR 200.30-3(a)(12).