

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50332; File No. SR-Phlx-2004-49)

September 9, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment No. 1 Thereto by the Philadelphia Stock Exchange, Inc. Relating to Fees Applicable to the Exchange's Electronic Trading Platform, Phlx XL

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4² thereunder, notice is hereby given that on July 29, 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 Phlx. On August 13, 2004, Phlx submitted an amendment to the proposed rule change.³ The proposed rule change has been filed by the Phlx as establishing or changing a due, fee, or other charge, pursuant to Section 19(b)(3)(A)(ii) of the Act,⁴ and Rule 19b-4(f)(2)⁵ thereunder, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Richard S. Rudolph, Director and Counsel, Phlx, to Deborah Lassman Flynn, Assistant Director, Division of Market Regulation, Commission, dated August 12, 2004 ("Amendment No. 1"). In Amendment No. 1, the Phlx added a footnote to the text of its proposed fee schedule indicating that the 50% pass-through charge applicable to those Streaming Quote Traders to whom the Exchange supplies Hyperfeed data is subject to a pilot scheduled to expire on January 28, 2005. The Phlx also made technical, non-substantive changes to the proposed rule text.

⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

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 amend its fee schedule in anticipation of the deployment of its electronic trading platform for options, Phlx XL.⁶ Specifically, the Exchange proposes: (1) to establish charges applicable to Exchange Registered Options Traders (“ROTs”) that submit proprietary electronic quotations (“streaming quotes”),⁷ and (2) to no longer charge the option specialist for listed options currently subject to the Exchange’s Specialist Deficit (Shortfall) fee (“shortfall fee”),⁸ when that option is offered on Phlx XL.

SQT Fees

The Phlx has determined to assess SQTs a 50% pass-through charge relating to costs borne by the Phlx for data it will provide to SQTs who desire to obtain from the Exchange real-time underlying data to enable them to price the overlying options (“Hyperfeed” costs)⁹ in

⁶ See Securities Exchange Act Release No. 50100 (July 27, 2004), 69 FR 46612 (August 3, 2004) (SR-Phlx-2003-59).

⁷ Such ROTs are known as Streaming Quote Traders (“SQTs”). See Phlx Rule 1014(b).

⁸ See Securities Exchange Act Release Nos. 48206 (July 22, 2003), 68 FR 44555 (July 29, 2004) (SR-Phlx-2003-45); and 48207 (July 22, 2003), 68 FR 44558 (July 29, 2003) (SR-Phlx-2003-47). The Exchange charges a fee of \$0.35 per contract for specialists trading any Top 120 Option if 12% of the total national monthly contract volume for such Top 120 Option is not effected on the Exchange. The fee is limited to \$10,000 per month per option provided that the total monthly market share effected on the Phlx in the Top 120 Option is equal to or greater than 50% of the volume threshold in effect.

⁹ SQTs trading options on Phlx XL will use handheld devices for the purpose of streaming quotations in options in which they are assigned. The Exchange will not supply the handheld devices; SQTs will obtain the handheld devices from one of several Exchange-approved vendors. Some vendors provide underlying data to the SQT who uses their handheld as a service to enable such SQT to price overlying options, while other vendors do not. The Exchange will provide such underlying data, obtained from a third-party service provider, to those SQTs whose vendors do not provide such data as part of the service they provide to the SQT. The Hyperfeed fee represents a pass-through of 50% of the costs borne by the Exchange in obtaining and providing such data to such SQTs.

addition to any other applicable fees.¹⁰ The 50% pass-through charge will be implemented beginning on the first day of deployment of the first option to trade on Phlx XL, and will apply on a pilot basis to those SQTs that the Exchange supplies Hyperfeed data for the first 180 days of deployment of Phlx XL.¹¹

Shortfall Fee

The shortfall fee is a component of the Exchange's Specialist Fixed Fee calculation.¹² Therefore, for any options specialist that has elected the Specialist Fixed Fee and lists an option that was subject to the shortfall fee (which was used in calculating the Specialist Fixed Fee), the Specialist's Fixed Fee will be reduced by the amount of the shortfall fee. The Specialist Fixed Fee calculation and the shortfall fee will be pro-rated in the month in which the option is deployed on Phlx XL.¹³

The text of the proposed rule change is available at the Phlx, at the Commission, and on the Commission's Web site, www.sec.gov/rules/sro/phlx.shtml.

¹⁰ Members who stream proprietary quotations in "Streaming Quote Options" traded on Phlx XL will also pay any Exchange transaction-related fees as well as non transactional-related fees and membership-related fees in effect during this time period, when applicable, such as trading post/booth, floor facility, shelf space and permit fees.

¹¹ The Commission notes that any changes or pilot extensions of the Hyperfeed data pass-through charge would require the Phlx to file a proposed rule change pursuant to Section 19(b) of the Act.

¹² See Securities Exchange Act Release Nos. 48459 (September 8, 2003), 68 FR 54034 (September 15, 2003) (SR-Phlx-2003-61); 49467 (March 24, 2004), 69 FR 17017 (March 31, 2004) (SR-Phlx-2004-17); and 49770 (May 25, 2004), 69 FR 31150 (June 2, 2004) (SR-Phlx-2004-31).

¹³ The Exchange intends to roll out equity options on the Phlx XL in stages. Unlike the Hyperfeed fee, the shortfall fee calculation will not be limited to the first 180 calendar days of deployment of Phlx XL.

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 the proposed rule change and discussed any comments it received on the proposed rule change. 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

The purpose of the proposed rule change, as amended, is to adopt fees relating to Phlx XL. With respect to the Hyperfeed fee, the purpose is to recoup part of the costs borne by the Exchange for data supplied by the Exchange to SQTs in connection with the anticipated deployment of Phlx XL. The Exchange believes that the 50% pass-through cost should enable ROTs that wish to become SQTs to make the transition on a cost-effective basis, with the Exchange effectively absorbing 50% of the Hyperfeed costs during the 180 day deployment of Phlx XL. With respect to the shortfall fee, the purpose of the proposed rule change, as amended, is to address the effect of the shortfall fee calculation as it relates to options traded on Phlx XL. The Exchange believes that it would be unreasonable to impose a shortfall fee on specialists (once there are streaming quotes) when SQTs will be competing for market share on a relatively equal basis, as the shortfall fee was designed, in part, to create an incentive for specialists to promote the options they have been allocated.

2. Statutory Basis

The Phlx believes that its proposal to amend its schedule of dues, fees, and charges is consistent with Section 6(b) of the Act¹⁴ in general, and furthers the objectives of Section 6(b)(4) of the Act¹⁵ in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among Exchange members who become SQTs.

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 inappropriate burden on competition.

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 proposed rule change, as amended, has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,¹⁶ and Rule 19b-4(f)(2)¹⁷ thereunder, because it establishes or changes a due, fee, or other charge. At any time within 60 days of the filing of the proposed rule change, as amended, 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.¹⁸

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(4).

¹⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁷ 17 CFR 240.19b-4(f)(2).

¹⁸ For purposes of calculating the 60-day abrogation period, the Commission considers the period to commence on August 13, 2004, the date Phlx filed Amendment No. 1.

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 E-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2004-49 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-2004-49. 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 Section, 450 Fifth Street, NW, Washington, DC 20549. 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-2004-49 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.¹⁹

Margaret H. McFarland
Deputy Secretary

¹⁹ 17 CFR 200.30-3(a)(12).