

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51096; File No. SR-Phlx-2004-96)

January 28, 2005

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendments No. 1 and No. 2 Thereto Relating to its Equity Option Specialist Deficit (Shortfall) Fee

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 30, 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 and II below, which Items have been prepared by the Exchange. The Phlx submitted Amendments No.1 and No. 2 to the proposal on January 25, 2005, and January 28, 2005, respectively.³ The proposed rule change, as amended, 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 Act⁴ 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.

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

The Phlx proposes to amend its Equity Option Specialist Deficit (Shortfall) Fee (“shortfall fee”) in two ways: 1) to include Streaming Quote Options traded on Phlx XL, the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendments No. 1 and No. 2 made clarifying changes to the tiered threshold schedule applicable during the transition period, described at infra note 8, and other minor technical changes.

⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

⁵ 17 CFR 240.19b-4(f)(2).

Exchange's electronic trading platform for options, in the shortfall fee calculation, which have thus far been exempt from the shortfall fee; and 2) to amend the amount of the shortfall fee cap and revise how it is applied per option for the top 120 options, including Streaming Quote Options traded on Phlx XL.

Currently, specialists⁶ are required to reach a total national monthly contract volume of at least 12 percent in any top 120 option,⁷ in most cases,⁸ in order not to be charged a monthly shortfall fee of \$0.35 per contract by the Phlx.⁹ However, the shortfall fee is currently not applicable to top 120 Streaming Quote Options traded on Phlx XL.¹⁰ At this time, the Exchange proposes to charge equity options specialist units the shortfall fee of \$0.35 per contract currently in effect to be paid monthly in connection with transactions in any top 120 Streaming Quote Option traded on Phlx XL if at least 12 percent of the total national monthly contract volume in that option is not effected on the Exchange in that month.

⁶ The Exchange uses the terms "specialist unit" and "specialist" interchangeably herein.

⁷ A top 120 option is defined as one of the 120 most actively traded equity options in terms of the total number of contracts in that option that were traded nationally for a specified month, based on volume reflected by The Options Clearing Corporation.

⁸ An exception to the 12 percent volume threshold amount relates to a transition period for newly listed top 120 options or for any top 120 option (including those equity options listed on the Exchange before February 1, 2004) acquired by a new specialist unit. During the transition period, the shortfall fee is imposed in stages such that the requisite volume threshold is zero percent for the first full calendar month of trading, three percent for the second full calendar month of trading, six percent for the third full calendar month of trading, nine percent for the fourth full calendar month of trading and 12 percent for the fifth full calendar month of trading (and thereafter). See Securities Exchange Act Release No. 49324 (February 26, 2004), 69 FR 10089 (March 3, 2004) (SR-Phlx-2004-08).

⁹ See Securities Exchange Act Release No. 48206 (July 22, 2003), 68 FR 44555 (July 29, 2003) (SR-Phlx-2003-45).

¹⁰ See Securities Exchange Act Release No. 50332 (September 9, 2004), 69 FR 55858 (September 16, 2004) (SR-Phlx-2004-49).

The Exchange also proposes to amend the amount of the shortfall fee cap and its application. The shortfall fee cap will be applicable to all top 120 options pursuant to the following schedule:¹¹

- If Phlx volume in any top 120 equity option, except options on Nasdaq-100 Index Tracking StockSM (traded under the symbol “QQQQ”),¹² is less than or equal to 50 percent of the current threshold volume (presently 6 percent), a cap of \$10,000 will apply.
- If Phlx volume in any top 120 equity option, except options on QQQQ, is greater than 50 percent of the current threshold volume (presently 6 percent) and less than 12 percent of the total national monthly contract volume, a cap of \$5,000 will apply.

¹¹ Currently, the Exchange imposes a limit of \$10,000 to the specialists on the amount of the shortfall fee per option, per month for any top 120 option, excluding options traded on Phlx XL, provided that the market share effected on the Phlx for that top 120 option is equal to or greater than 50 percent of the applicable national monthly contract volume threshold in effect. The volume threshold is 12 percent in most cases. Therefore, for each month, if a specialist unit trades an amount equal to or greater than 6 percent of the total national market share, the shortfall fee is imposed, but is currently limited to \$10,000 per option, per month. See Securities Exchange Act Release No. 49324 (February 26, 2004), 69 FR 10089 (March 3, 2004) (SR-Phlx-2004-08). Pursuant to this proposal, the amount of the cap and how it is applied per option will change.

¹² 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 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 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.

- If Phlx volume in options on QQQQ is less than or equal to 50 percent of the current threshold volume (presently 6 percent), a cap of \$20,000 will apply.
- If Phlx volume in options on QQQQ is greater than 50 percent of the current threshold volume (presently 6 percent) and less than 12 percent of the total national monthly contract volume, a cap of \$10,000 will apply.

All other aspects of the shortfall fee will remain unchanged.¹³ The proposal is scheduled to be effective for trades settling on or after January 3, 2005.

The text of the proposed rule change is available on the Phlx's Web site (www.phlx.com), at the Phlx's Office of the Secretary, 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 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.

¹³ For example, the total volume calculation for purposes of determining the requisite threshold will continue to be based on the current month's volume and the three-month differentiation to determine whether an equity option is considered a top 120 option will also remain in effect, *i.e.* December's top 120 options are based on September's volume. In addition, the \$10,000 cap applied in connection with the tiered threshold schedule for any newly listed top 120 option and any top 120 option acquired by a new specialist unit, not affiliated with an existing Phlx options specialist unit, will remain unchanged. See Securities Exchange Act Release No. 49324 (February 26, 2004), 69 FR 10089 (March 3, 2004) (SR-Phlx-2004-08).

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

1. Purpose

The shortfall fee is designed to create an incentive for options specialists to promote the options for which they are the designated specialists. The purpose of applying the shortfall fee to Streaming Quote Options is to encourage specialist units trading in the top 120 options to garner a certain percentage of market share. In addition, the Exchange believes that amending the shortfall fee cap should encourage specialists to continue to compete for market share in the top 120 options, while reducing the economic burden on specialists who are competing for order flow in the national market in the top 120 options. The Exchange believes that it is appropriate to establish higher shortfall fee caps for options on QQQQ because the volume in that option far exceeds the volume in any other option.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act,¹⁴ in general, and furthers the objectives of Section 6(b)(4) of the Act,¹⁵ in particular, in that it is an equitable allocation of reasonable fees among Exchange members.

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.

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(4).

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 Act¹⁶ and Rule 19b-4(f)(2)¹⁷ thereunder, because it changes a fee imposed by the Exchange. 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

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:

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-2004-96 on the subject line.

¹⁶ 15 U.S.C. 78(s)(b)(3)(A)(ii).

¹⁷ 17 CFR 240.19b-4(f)(2).

¹⁸ See 15 U.S.C. 78s(b)(3)(C). For purposes of calculation the 60-day abrogation period, the Commission considers the period to commence on January 28, 2005, the date the Phlx filed Amendment No. 2.

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-2004-96. 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-2004-96 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).