

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51926; File No. SR-Phlx-2004-65)

June 27, 2005

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment Nos. 1, 2, and 3 Relating to Back-up Trading Arrangements

I. Introduction

On October 18, 2004, the Philadelphia Stock Exchange, Inc. (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change to establish rules covering emergency procedures for Phlx members and back-up trading arrangements in the event that the Exchange’s main facility is unavailable. On April 29, 2005, the Exchange submitted Amendment No. 1 to the proposal.³ On May 12, 2005, the Exchange submitted Amendment No. 2 to the proposal.⁴ On May 16, 2005, the Exchange

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, the Exchange substantially revised the proposed rule text and added a new paragraph (d), Member Proceedings, to establish disciplinary jurisdiction as between the Disabled Exchange and the Back-up Exchange in situations where there is an ongoing disciplinary action involving a member of the Disabled Exchange at the time of termination of the back-up period. The Exchange also proposed amendments to its fee schedules, which incorporate Rule 99.

⁴ In Amendment No. 2, the Exchange made minor revisions to the proposed rule text and corresponding description of the proposal. Phlx also refiled corrected versions of the exhibits submitted with the proposal. Amendment No. 2 replaces and supersedes Phlx’s earlier submissions in their entirety. Additionally, Phlx submitted with its Amendment No. 2 a copy of the back-up trading agreement between itself and the Chicago Board Options Exchange, Incorporated (“CBOE”) as Exhibit 3A to its Form 19b-4 filing, together with a copy of a first amendment to the agreement as Exhibit 3B. This back-up trading agreement is available for viewing on the Commission’s Web site, www.sec.gov/rules/sro.shtml, and at the Exchange and the Commission.

submitted Amendment No. 3 to the proposal.⁵ The proposed rule change, as amended, was published for notice and comment in the Federal Register on May 25, 2005.⁶ The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change, as amended.

II. Description of Proposal

The Phlx proposes to adopt a rule that will permit Phlx to enter into arrangements with one or more other exchanges that would provide trading facilities for Phlx listed options at another exchange in the event that the functions of Phlx are severely and adversely affected by an emergency or extraordinary circumstances (a “Disabling Event”), and similarly provide trading facilities at Phlx for another exchange to trade its listed options if that exchange’s facility experiences a Disabling Event. Phlx also proposes changes to its fee schedule relative to the fees that shall apply to transactions in the options of a Disabled Exchange executed on a Back-up Exchange.

A. Rule 99 – Back-up Trading Arrangements

a. Background

As set forth in the Notice, the Exchange proposes to adopt new Rule 99, Backup Trading Arrangements, which would govern the arrangements with one or more other exchanges (each a “Back-up Exchange”) to permit Phlx and its members to use a portion of a Back-up Exchange’s

⁵ In Amendment No. 3, the Exchange submitted a revised Exhibit 5 to its amended Form 19b-4 to correctly identify the new rule text in the proposal, including Exchange Rule 99 and changes to the Phlx Fee Schedule.

⁶ See Securities Exchange Act Release No. 51718 (May 19, 2005), 70 FR 30171 (“Notice”).

facilities to conduct the trading of Phlx exclusively listed options⁷ in the event of a Disabling Event, and similarly will permit Phlx to provide trading facilities at Phlx for another exchange's exclusively listed options if that exchange (a "Disabled Exchange") is prevented from trading due to a Disabling Event.

Proposed Rule 99 would also permit Phlx to enter into arrangements with a Back-up Exchange to provide for the listing and trading of Phlx singly listed options⁸ by the Back-up Exchange if Phlx's facility becomes disabled, and conversely provide for the listing and trading by Phlx of the singly listed options of a Disabled Exchange.⁹

b. If Phlx Is the Disabled Exchange

Section (a) of proposed Rule 99 describes the back-up trading arrangements that would apply if Phlx were the Disabled Exchange. Under proposed paragraph (a)(i)(B), the facility of

⁷ For purposes of proposed Phlx Rule 99, the term "exclusively listed option" means an option that is listed exclusively by an exchange (because the exchange has an exclusive license to use, or has proprietary rights in, the interest underlying the option). See Phlx Rule 99(a)(i)(A).

⁸ For purposes of proposed Phlx Rule 99, the term "singly listed option" means an option that is not an "exclusively listed option" but that is listed by an exchange and not by any other national securities exchange. See Phlx Rule 99(a)(ii)(A).

⁹ In its proposal, Phlx stated that the back-up trading arrangements contemplated by proposed Rule 99 represent the Exchange's immediate plan to ensure that Phlx's exclusively listed and singly listed options will have a trading venue if a catastrophe renders its primary facility inaccessible or inoperable. The Exchange noted that, in September 2003, it had entered into separate Memoranda of Understanding with the American Stock Exchange LLC ("Amex") and CBOE to memorialize their mutual understanding to work together to develop bi-lateral back-up trading arrangements in the event that trading is prevented at one of the exchanges due to a Disabling Event. Since then, the Exchange has been working with these exchanges to put in place written agreements outlining essential commercial terms with respect to the arrangements as well as operational plans that describe the operational and logistical aspects of the arrangements. At present, Phlx and CBOE have signed an agreement relative to back-up trading arrangements and completed a joint operational plan. See supra note 4.

the Back-up Exchange used by Phlx to trade some or all of Phlx's exclusively listed options will be deemed to be a facility of Phlx, and such option classes shall trade as listings of Phlx.

Since the trading of Phlx exclusively listed options will be conducted using the systems of the Back-up Exchange, proposed paragraph (a)(i)(C) provides that the trading of Phlx exclusively listed options on Phlx's facility at the Back-up Exchange would be conducted in accordance with the rules of the Back-up Exchange, except that such trading would be subject to Phlx rules with respect to doing business with the public, margin requirements, net capital requirements, listing requirements and position limits.¹⁰ In addition, Phlx and the Back-up Exchange may agree that other Phlx rules will apply to such trading.¹¹ The Back-up Exchange rules that govern trading on Phlx's facility at the Back-up Exchange shall be deemed to be Phlx rules for purposes of such trading.

Proposed paragraph (a)(i)(D) reflects that the Back-up Exchange has agreed to perform the related regulatory functions with respect to trading of Phlx exclusively listed options on Phlx's facility at the Back-up Exchange, in each case except as Phlx and the Back-up Exchange may specifically agree otherwise. The Back-up Exchange and Phlx will coordinate with each other regarding surveillance and enforcement respecting such trading. Phlx shall retain the

¹⁰ As specified in Phlx Rule 99(a)(i)(C), the Exchange will notify its members which rules apply in advance of trading.

¹¹ As stated above, Phlx's back-up trading arrangements with CBOE contemplate that the operation of the Disabled Exchange's facility at the Back-up Exchange will be conducted in accordance with the rules of the Back-up Exchange except that (i) the rules of the Disabled Exchange will apply with respect to doing business with the public, margin requirements, net capital requirements and listing requirements, and (ii) the members of the Disabled Exchange that are trading on the facility of the Disabled Exchange at the Back-up Exchange (not including members of the Back-up Exchange who become temporary members of the Disabled Exchange) will be subject to the rules of the Disabled Exchange governing or applying to the maintenance of a person's or a firm's status as a member of the Disabled Exchange.

ultimate legal responsibility for the performance of its self-regulatory obligations with respect to Phlx's facility at the Back-up Exchange.

Under proposed paragraph (a)(i)(E), if the Back-up Exchange is unable to accommodate all Phlx members that desire to trade on Phlx's facility at the Back-up Exchange, Phlx would have the right to determine which members shall be eligible to trade at that facility by considering factors such as whether the member is the specialist in the applicable product(s), the number of contracts traded by the member in the applicable product(s), market performance, and other factors relating to a member's contribution to the market in the applicable product(s).

Under proposed paragraph (a)(i)(F), members of the Back-up Exchange will not be authorized to trade in any Phlx exclusively listed options, except that (i) Phlx may deputize willing floor brokers of the Back-up Exchange as temporary Phlx members to permit them to execute orders as brokers in Phlx exclusively listed options traded on Phlx's facility at the Back-up Exchange,¹² and (ii) the Back-up Exchange has agreed that it will, at the instruction of Phlx, select members of the Back-up Exchange that are willing to be deputized by Phlx as temporary Phlx members authorized to trade Phlx exclusively listed options on Phlx's facility at the Back-up Exchange for such period of time following a Disabling Event as Phlx determines to be appropriate, and Phlx may deputize such members of the Back-up Exchange as temporary Phlx members for that purpose. The second of the foregoing exceptions would permit members of the Back-up Exchange to trade Phlx exclusively listed options on the Phlx facility on the Back-up

¹² The exchanges that acted as Back-up Exchanges in previous emergency situations also deputized floor brokers in this manner. See Securities Exchange Act Release No. 27365 (October 19, 1989), 54 FR 43511 (October 25, 1989) (approving trading of options listed on the Pacific Stock Exchange at other exchanges in wake of earthquake); Securities Exchange Act Release No. 40088 (June 12, 1998), 63 FR 33426 (June 18, 1998) (approving trading of Dell options listed on Phlx at Amex on a temporary basis).

Exchange if, for example, circumstances surrounding a Disabling Event result in Phlx members being delayed in arriving at the Back-up Exchange in time for prompt resumption of trading.

Section (a)(ii) of the proposed rule provides for the continued trading of Phlx singly listed options at a Back-up Exchange in the event of a Disabling Event at Phlx. Proposed paragraph (a)(ii)(B) provides that Phlx may enter into arrangements with a Back-up Exchange under which the Back-up Exchange will agree, in the event of a Disabling Event, to list for trading options that are then singly listed only by Phlx. Such options would trade on the Back-up Exchange as listings of the Back-up Exchange and in accordance with the rules of the Back-up Exchange. Under proposed paragraph (a)(ii)(C), any such option listed by the Back-up Exchange that does not satisfy the standard listing and maintenance criteria of the Back-up Exchange will be subject, upon listing by the Back-up Exchange, to delisting (and, thus, restrictions on opening new series, and engaging in opening transactions in those series with open interest, as may be provided in the rules of the Back-up Exchange).

Phlx singly listed options would be traded by members of the Back-up Exchange and by Phlx members selected by Phlx to the extent the Back-up Exchange can accommodate Phlx members in the capacity of temporary members of the Back-up Exchange. If the Back-up Exchange is unable to accommodate all Phlx members that desire to trade Phlx singly listed options at the Back-up Exchange, Phlx may determine which members would be eligible to trade such options at the Back-up Exchange by considering the same factors used to determine which Phlx members are eligible to trade Phlx exclusively listed options at the Phlx facility at the Back-up Exchange.

c. If Phlx Is the Back-up Exchange

Section (b) of proposed Rule 99 describes the back-up trading arrangements that would apply if Phlx were the Back-up Exchange. In general, the provisions in Section (b) are the converse of the provisions in Section (a). With respect to the exclusively listed options of the Disabled Exchange, the facility of Phlx used by the Disabled Exchange to trade some or all of the Disabled Exchange's exclusively listed options would be deemed to be a facility of the Disabled Exchange, and such options would trade as listings of the Disabled Exchange. Trading of the Disabled Exchange's exclusively listed options on the Disabled Exchange's facility at Phlx would be conducted in accordance with Phlx rules, except that (i) such trading would be subject to the Disabled Exchange's rules with respect to doing business with the public, margin requirements, net capital requirements, listing requirements, and position limits, and (ii) members of the Disabled Exchange that are trading on the Disabled Exchange's facility at Phlx (not including Phlx members who become temporary members of the Disabled Exchange pursuant to paragraph (b)(i)(D)) would be subject to the rules of the Disabled Exchange governing or applying to the maintenance of a person's or a firm's status as a member of the Disabled Exchange. In addition, the Disabled Exchange and Phlx may agree that other Disabled Exchange rules will apply to such trading.

Phlx will perform the related regulatory functions with respect to such trading, in each case except as the Disabled Exchange and Phlx may specifically agree otherwise. Proposed paragraph (b)(i)(C) reflects that the Disabled Exchange has agreed to retain the ultimate legal responsibility for the performance of its self-regulatory obligations with respect to the Disabled Exchange's facility at Phlx.

Section (b)(ii) describes the arrangements applicable to trading of the Disabled Exchange's singly listed options at Phlx, and is the converse of Section (a)(ii). One difference is the last sentence in paragraph (b)(ii)(A), which provides that Phlx may allocate singly listed option classes of the Disabled Exchange to a Phlx Specialist in advance of a Disabling Event, without utilizing the allocation process under Phlx Rule 506, to enable Phlx to quickly list such option classes upon the occurrence of a Disabling Event.

d. Member Obligations

Phlx Rule 99(c) describes the obligations of members and member organizations with respect to the trading by temporary members of a Disabled Exchange pursuant to a back-up trading agreement.

Section (c)(i) sets forth the obligations applicable to Phlx members who act in the capacity of temporary members of the Disabled Exchange on the facility of the Disabled Exchange at the Back-up Exchange. Section (c)(i) provides that a Phlx member acting as a temporary member of the Disabled Exchange shall be subject to, and obligated to comply with, the rules that govern the operation of the facility of the Disabled Exchange at Phlx. This would include the rules of the Disabled Exchange to the extent applicable during the period of such trading, including the rules of the Disabled Exchange limiting its liability for the use of its facilities that apply to members of the Disabled Exchange. Additionally, (1) such Phlx member acting as a temporary member of the Disabled Exchange shall be deemed to have satisfied, and the Disabled Exchange has agreed to waive specific compliance with, rules governing or applying to the maintenance of a person's or a firm's status as a member of the Disabled Exchange, including all dues, fees and charges imposed generally upon members of the Disabled Exchange based on their status as such; (2) such Phlx member acting as a temporary member of

the Disabled Exchange shall have none of the rights of a member of the Disabled Exchange except the right to conduct business on the facility of the Disabled Exchange at the Back-up Exchange to the extent described in the Rule; (3) the member organization associated with such Phlx member acting as a temporary member of the Disabled Exchange, if any, shall be responsible for all obligations arising out of that Phlx member's activities on or relating to the Disabled Exchange, and (4) the clearing member of such Phlx member shall guarantee and clear the transactions of such temporary member on the Disabled Exchange.

Section (c)(ii) sets forth the obligations applicable to Phlx members who act in the capacity of temporary members of the Back-up Exchange for the purpose of trading singly and multiply listed options of the Disabled Exchange. Such Phlx members shall be subject to, and obligated to comply with, the rules of the Back-up Exchange that are applicable to the Back-up Exchange's own members, including the rules of the Back-up Exchange limiting its liability for the use of its facilities that apply to members of the Back-up Exchange. Phlx members who act in the capacity of temporary members of the Back-up Exchange have the same obligations as those set forth in Section (c)(i) that apply to temporary members of the Disabled Exchange, except that, in addition, Phlx members who act in the capacity of temporary members of the Back-up Exchange shall only be permitted (1) to act in those capacities on the Back-up Exchange that are authorized by the Back-up Exchange and that are comparable to capacities in which the temporary member has been authorized to act on the Disabled Exchange, and (2) to trade in those options in which the temporary member is authorized to trade on the Disabled Exchange.

e. Member Proceedings

As noted above, proposed Phlx Rule 99 provides that the rules of the Back-up Exchange shall apply to the trading of the singly and multiply listed options of the Disabled Exchange traded on the Back-up Exchange's facilities, and (with certain limited exceptions) the trading of exclusively listed options of the Disabled Exchange traded on the facility of the Disabled Exchange at the Back-up Exchange. The proposed rule contemplates that the Back-up Exchange will perform the related regulatory functions with respect to such trading (except as the Back-up Exchange and the Disabled Exchange may specifically agree otherwise).

Section (d) of proposed Rule 99 provides that if a Backup Exchange initiates an enforcement proceeding with respect to the trading during a backup period of singly or multiply listed options of the Disabled Exchange by a temporary member of the Backup Exchange or exclusively listed options of the Disabled Exchange by a member of the Disabled Exchange (other than a member of the Backup Exchange who is a temporary member of the Disabled Exchange), and such proceeding is in process upon the conclusion of the backup period, the Backup Exchange may transfer responsibility for such proceeding to the Disabled Exchange following the conclusion of the backup period. This approach to the exercise of enforcement jurisdiction is also consistent with past precedent.¹³

With respect to arbitration jurisdiction, proposed Section (d) provides that arbitration of any disputes with respect to any trading during a backup period of singly or multiply listed options of the Disabled Exchange or of exclusively listed options of the Disabled Exchange on the Disabled Exchange's facility at the Backup Exchange will be conducted in accordance with the rules of the Backup Exchange, unless the parties to an arbitration agree that it shall be conducted in accordance with the rules of the Disabled Exchange.

¹³ See supra note 12.

The purpose of these provisions is to permit a Backup Exchange to confer its temporary enforcement jurisdiction over a member or member organization of the Disabled Exchange back to the Disabled Exchange once the Disabled Exchange resumes normal operations.

f. Member Preparations

To ensure that members are prepared to implement Phlx 's back-up trading arrangements, proposed Section (e) of Proposed Rule 99 requires Phlx members to take appropriate actions as instructed by Phlx to accommodate Phlx 's back-up trading arrangements with other exchanges and Phlx's own back-up trading arrangements.

B. Fee Schedule

The Exchange proposes to add a footnote to its Fee Schedule to inform its members regarding what fees will apply to transactions in the listed options of a Disabled Exchange effected on a Backup Exchange under Rule 99. The footnote provides that if Phlx is the Disabled Exchange, the Backup Exchange has agreed to apply the per contract and per contract side fees in the Phlx fee schedule to transactions in Phlx exclusively listed options traded on the Phlx facility on the Backup Exchange.¹⁴ If any other Phlx listed options are traded on the Backup Exchange (such as Phlx singly listed options) pursuant to Phlx Rule 99, the fee schedule of the Backup Exchange shall apply to such trades. The footnote contains a second paragraph stating the converse if Phlx is the Backup Exchange under Rule 99.

III. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful consideration, the Commission finds that Phlx's proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder,

¹⁴ When Phlx Dell options relocated to Amex in June 1998, Phlx fees applied to transactions in Dell options on the Amex. See supra note 12.

applicable to a national securities exchange.¹⁵ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁶ in that it is designed to perfect the mechanisms of a free and open market and to protect investors and the public interest.

In light of the heightened security risks to the financial markets since the September 11, 2001 attacks on the World Trade Centers in New York City, the Commission has worked with the national securities exchanges to develop contingency plans and emergency procedures, suggesting measures to minimize the potential disruption and market impact that a future Disabling Event could cause. The present rule change proposal is a direct response to that effort.

The Commission believes that Phlx's proposed rule changes are reasonably designed to address the key elements necessary to mitigate the effects of a Disabling Event affecting the Exchange. Specifically, the back-up trading arrangements contemplated by proposed Phlx Rule 99 are intended to ensure that Phlx's exclusively listed and singly listed options will have a trading venue in the event that trading at Phlx is prevented due to a Disabling Event, thus minimizing potential disruptions for the markets and investors under those circumstances.¹⁷ The proposed rule also provides authority for Phlx to provide a back-up trading venue should another exchange be affected by a Disabling Event.

The Commission likewise finds that the proposed change to the Exchange's Fee Schedule is consistent with the Act. By affirming that Phlx and, by mutual agreement, the Back-up Exchange will apply the per contract and per contract side fees normally applicable to

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

¹⁶ 15 U.S.C. 78f(b)(5).

¹⁷ The Commission notes that it has approved the basic approach set forth in the proposal of deeming a portion of the Back-up Exchange's facilities to be a facility of the Disabled Exchange. See supra note 12.

exclusively listed options under the Disabled Exchange's fee schedule, the Commission believes that the proposed rule change appears to be reasonably designed to minimize the disruption associated with back-up trading of such options. The proposal also clarifies that, with regard to singly listed options, the fees charged shall be those set forth in the Back-up Exchange fee schedule where trading occurs at a Back-up Exchange, or, where trading occurs at Phlx, the Phlx fee schedule.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁸ that the proposed rule change (SR-Phlx-2004-65), as amended by Amendment Nos. 1, 2 and 3, is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Margaret H. McFarland
Deputy Secretary

¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ 17 CFR 200.30-3(a)(12).