

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52903; File No. SR-Phlx-2005-67)

December 7, 2005

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Maintenance, Retention and Furnishing of Books, Records and Other Information Regarding Payment For Order Flow

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 3, 2005, 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 Exchange. On November 22, 2005, the Phlx submitted Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Phlx proposes to amend Phlx Rule 760, Maintenance, Retention and Furnishing of Books, Records and Other Information, to incorporate recent changes to the Exchange’s payment for order flow program.

The Exchange recently amended its payment for order flow program for trades settling on or after October 1, 2005 (“October program”).⁴ Registered Options Traders who receive

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 provided clarifying language to Phlx Rule 760 and the purpose section of the filing.

⁴ The October program is in effect as a pilot program that is scheduled to expire on May 27, 2006. See Securities Exchange Act Release No. 52568 (October 6, 2005), 70 FR 60120 (October 14, 2005) (SR-Phlx-2005-58).

electronically-delivered orders directed to them (“Directed ROTs”) may, pursuant to the October program, direct the Exchange to make payments to order flow providers on their behalf.⁵ Thus, the Exchange proposes to amend Phlx Rule 760 to clarify that these Directed ROTs would now be required to retain records relating to payment for order flow arrangements.⁶

The text of Rule Phlx 760, as proposed to be amended, is set forth below with new language underlined and deletions in [brackets].

Rule 760.

Maintenance, Retention and Furnishing of Books, Records and Other Information

Every member and member organization shall make, keep current and preserve such books and records as the Exchange may prescribe and as may be prescribed by the Securities Exchange Act of 1934 and the rules and regulations thereunder. No member or member organization shall refuse to make available to the Exchange such books, records or other information as may be called for under the rules or as may be requested in connection with an investigation by the Exchange.

Supplementary Material: ...

.01 Without limiting the general provisions of Rule 760, such Rule requires Registered Options Traders who receive electronically-delivered orders directed to them, Specialists [or] and Specialist Units who request that payments be made [funds, or who make payments] to order

⁵ The Exchange represents that under previous payment for order flow programs, specialist units requested reimbursement from the Exchange for monies they paid to order flow providers. Pursuant to the October program, the available payment for order flow funds would be disbursed by the Exchange according to the instructions of the specialist units and Directed ROTs.

⁶ The Exchange represents that specialists/specialist units are already specifically required to maintain these books and records.

flow providers as part of the Exchange's payment for order flow program, to make, keep current and preserve all books and records relating to payment for order flow arrangements, including but not limited to all records pertaining to the identity of the order flow providers, [and] the [origin, use, transfer, distribution and] rates, and the basis for the amounts they have directed the Exchange to pay to order flow providers [of all payments] (whether on a per contract or flat fee basis). [Such records should be maintained in such a fashion as to permit the Exchange to track payments to order flow providers on an option by option basis.] Such books and records shall be made available as may be requested by the Exchange.

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 Exchange 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 Exchange 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 Exchange states that the purpose of this proposal is to update Phlx Rule 760 to reflect recent changes to the Exchange's payment for order flow program, specifically including that Directed ROTs must now retain records relating to payment for order flow arrangements. The Exchange proposes to amend the Supplementary Material to Phlx Rule 760 because the Exchange's current payment for order flow program no longer tracks payments to order flow providers on an option by option basis. In addition, the Exchange notes that specialists and

specialist units no longer need to maintain records relating to the use, transfer, and distribution of payment for order flow funds because they will now direct the Exchange to make on their behalf those payment for order flow payments to the order flow providers. The Exchange also proposes to specifically request that books and records regarding the rate (for example, \$0.25 per contract or a flat monthly rate) that is paid to order flow providers and the basis for the amount that Directed ROTs, specialists, and specialist units direct the Exchange to pay to order flow providers be maintained.

2. Statutory Basis

The Exchange believes the proposal is consistent with Section 6(b) of the Act⁷, in general, and furthers the objectives of Section 6(b)(1) of the Act,⁸ in particular, in that it assist the Exchange in determining and enforcing compliance with its rules assist the Exchange in determining an enforcing compliance with its rules (i.e., the specific terms of the Exchange's payment for order flow program). By enabling the Exchange to verify that the payment for order flow program is being administered in accordance with the terms thereof as approved by the Exchange and set forth in its filing with the Commission, this proposal also promotes just and equitable principles of trade consistent with Section 6(b)(1) of the Act.⁹

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

The Exchange does not believe that the proposed rule change will impose any burden on

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(1).

⁹ 15 U.S.C. 78f(b)(1).

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 by the Exchange on this proposal.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

- A. by order approve the proposed rule change or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

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 an e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2005-67 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-Phlx-2005-67. 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 Exchange. 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-2005-67 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.¹⁰

Jonathan G. Katz
Secretary

¹⁰ 17 CFR 200.30-3(a)(12).