

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51657; File No. SR-Phlx-2005-22]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendments No. 1 and No. 2 Relating to a Dividend Spread Transaction Fee Cap

May 5, 2005.

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 March 31, 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. The Phlx submitted Amendments No. 1 and No. 2 to the proposal on April 27, 2005,³ and May 4, 2005, respectively.⁴ 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 Act⁵ and Rule 19b-4(f)(2)⁶ 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 schedule of fees to amend its fee cap on equity option transaction and comparison charges on dividend spread transactions⁷ for a security with a declared dividend or distribution of less than \$0.25. For these transactions, the Registered Options Trader ("ROT") and specialist equity option transaction and comparison fees will be capped at \$1,000 per dividend spread transaction

effected pursuant to a dividend spread strategy executed on the same trading day in the same options class. The fee cap will be implemented after any applicable rebates are applied to ROT and specialist equity option transaction and comparison charges.⁸ The proposed fee cap would be effective for trades settling on or after April 1, 2005. The proposed fee cap will be in effect as a pilot program that will expire on September 1, 2005.

The text of the proposed rule change is available on the Phlx's Web site (<http://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.

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

1. Purpose

The Exchange imposes a fee cap of \$1,750 on ROT and specialist equity option transaction and comparison charges on dividend spread transactions and merger spread transactions.⁹ The purpose of capping at \$1,000 the ROT and specialist transaction and

comparison charges for dividend spread transactions for a security with a declared dividend or distribution of less than \$0.25 is to attract additional liquidity to the Exchange.¹⁰ In addition, the fee cap should provide an opportunity for specialists and ROTs to engage in additional dividend opportunities in lower dividend distributions at a reduced rate, whereas the \$1,750 current fee cap may not be economically beneficial because as the dividend distribution amount declines, the opportunity for a profitable strategy also declines. Thus, a lower cap should provide additional dividend strategy opportunities and additional business to the Exchange.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act,¹¹ in general, and furthers the objectives of Section 6(b)(4) of the Act,¹² 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 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 has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act¹³ and Rule 19b-4(f)(2)¹⁴ thereunder, because it changes a fee imposed by the Exchange. At any time within 60 days of the filing of the proposed rule change 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,

¹⁰ Similar to the Exchange's current rebate process, members who wish to benefit from the proposed fee cap will be required to submit to the Exchange a written rebate request with supporting documentation.

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(4).

¹³ 15 U.S.C. 78(s)(b)(3)(A)(ii).

¹⁴ 17 CFR 240.19b-4(f)(2).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 made clarifying and minor technical changes to the text of the proposal.

⁴ Amendment No. 2 included the expiration date of the pilot program regarding the Exchange's fee caps for dividend and merger spread transactions as part of the text of its fee schedule. See also Securities Exchange Act Release No. 51596 (April 21, 2005), 70 FR 22381 (April 29, 2005) (SR-Phlx-2005-19).

⁵ 15 U.S.C. 78s(b)(3)(A)(ii).

⁶ 17 CFR 240.19b-4(f)(2).

⁷ For purposes of this proposal, a "dividend spread" transaction is any trade done within a defined time frame pursuant to a strategy in which a dividend arbitrage can be achieved between any two deep-in-the-money options.

⁸ The Exchange provides a rebate for certain contracts executed in connection with transactions occurring as part of a dividend spread strategy. Specifically, for those options contracts executed pursuant to a dividend spread strategy, the Exchange rebates \$0.08 per contract side for ROT executions and \$0.07 per side for specialist executions on the business day before the underlying stock's ex-date. The ex-date is the date on or after which a security is traded without a previously declared dividend or distribution. After the ex-date, a stock is said to trade ex-dividend. See Securities Exchange Act Release No. 48983 (December 23, 2003), 68 FR 75703 (December 31, 2003) (SR-Phlx-2003-80).

⁹ For purposes of this proposal, the Exchange defines a "merger spread" transaction as a transaction executed pursuant to a merger spread strategy involving the simultaneous purchase and sale of options of the same class and expiration date, but different strike prices, followed by the exercise of the resulting long options position, each executed prior to the date on which shareholders of record are required to elect their respective form of consideration, i.e., cash or stock. See Securities Exchange Act Release No. 51596 (April 21, 2005) (SR-Phlx-2005-19).

or otherwise in furtherance of the purposes of the Act.¹⁵

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-2005-22 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-2005-22. 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-2005-22 and should be submitted on or before June 1, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁶

Margaret H. McFarland,

Deputy Secretary.

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UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2005.

SUMMARY: Pursuant to its authority under 28 U.S.C. 994(p), the Commission has promulgated amendments to the sentencing guidelines, policy statements, commentary, and statutory index. This notice sets forth the amendments and the reason for each amendment.

DATES: The Commission has specified an effective date of November 1, 2005, for the amendments set forth in this notice.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, 202-502-4590. The amendments set forth in this notice also may be accessed through the Commission's Web site at <http://www.ussc.gov>.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for Federal sentencing courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and generally submits guideline amendments to Congress pursuant to 28 U.S.C. 994(p) not later than the first day of May each year. Absent action of Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

Notice of proposed amendments was published in the **Federal Register** on February 23, 2005 (*see* 70 FR 8868). The Commission held a public hearing on

the proposed amendments in Washington, DC, on April 12, 2005. On April 29, 2005, the Commission submitted these amendments to Congress and specified an effective date of November 1, 2005.

Authority: 28 U.S.C. 994(a), (o), and (p); USSC Rule of Practice and Procedure 4.1.

Ricardo H. Hinojosa,

Chair.

1. Amendment: Chapter Two, Part B, Subpart 1 is amended by adding at the end the following new guideline and accompanying commentary:

“§ 2B1.6. Aggravated Identity Theft

(a) If the defendant was convicted of violating 18 U.S.C. 1028A, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

Commentary

Statutory Provision: 18 U.S.C. 1028A. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes

1. Imposition of Sentence.—

(A) In General.—Section 1028A of title 18, United States Code, provides a mandatory term of imprisonment. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. 1028A is the term required by that statute. Except as provided in subdivision (B), 18 U.S.C. 1028A also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

(B) Multiple Convictions Under Section 1028A.—Section 1028A(b)(4) of title 18, United States Code, provides that in the case of multiple convictions under 18 U.S.C. 1028A, the terms of imprisonment imposed on such counts may, in the discretion of the court, run concurrently, in whole or in part, with each other. *See* the Commentary to § 5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance regarding imposition of sentence on multiple counts of 18 U.S.C. 1028A.

2. Inapplicability of Chapter Two Enhancement.—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. A sentence under this guideline accounts for this factor for the underlying offense of conviction, including any such

¹⁵ 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 May 4, 2005, the date the Phlx filed Amendment No. 2.

¹⁶ 17 CFR 200.30-3(a)(12).