

consistent with section 6(b) of the Act,⁶ in general, and further the objectives of Section 6(b)(5),⁷ in particular, because they are designed to promote just and equitable principles of trade, to enhance competition and to protect investors and the public interest.

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 burden on 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

Written comments on the proposed rule change were neither solicited nor received.

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 self-regulatory organization consents, the Commission will:

(A) By order approve such 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. 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 such filing will also be available for inspection and copying at the principal office of the PCX. All submissions should refer to File No. SR-PCX-2001-13 and should be submitted by May 6, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁸

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45714; File No. SR-Phlx-00-93]

Self-Regulatory Organizations; Notice of Filing of Amendment Nos. 4, 5, 6 and 7 to That Portion of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Not Granted Accelerated Approval Relating to Providing Automatic Executions for Public Customer Orders at the NBBO

April 9, 2002.

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 January 15, 2002, March 1, 2002, March 8, 2002, and April 3, 2002, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") Amendment Nos. 4,³

5,⁴ 6,⁵ and 7,⁶ respectively, to that portion of the proposed rule change not previously granted accelerated approval, as described in Items I, II, and III below, which Items have been prepared by the Phlx.⁷ The proposed rule change and Amendment Nos. 1 and 2 thereto were granted partial accelerated approval and were originally published for comment in the **Federal Register** on December 14, 2000.⁸ On September 18, 2001, the Phlx filed Amendment No. 3 to the proposed rule change.⁹ The Commission is publishing this notice to solicit comments on Amendment Nos. 4, 5, 6, and 7 to the proposed rule change from interested persons.

⁴ See letter from Richard S. Rudolph, Counsel, Phlx, to Nancy J. Sanow, Assistant Director, Division, Commission dated February 28, 2002 ("Amendment No. 5"). In Amendment No. 5, the Exchange: (1) Clarified that the Exchange may determine to exclude quotes from its calculation of the NBBO on a series-by-series basis or issue-by-issue basis, or may determine to exclude all options quotes from an exchange, where appropriate; (2) represented that it maintains, on a daily basis, records of each instance in which it determines to exclude quotes from another exchange from the Exchange's calculation of the NBBO on a daily basis; and (3) stated that it will notify other exchanges of the determination to exclude its quotes from the Exchange's calculation of the NBBO and of any determination to re-include such exchange's quotes in the Exchange's calculation of the NBBO.

⁵ See letter from Richard S. Rudolph, Counsel, Phlx, to Nancy J. Sanow, Assistant Director, Division, Commission, dated March 7, 2002 ("Amendment No. 6"). In Amendment No. 6, the Exchange proposed to amend the rule text to require the Exchange to maintain a record of each instance in which another exchange's quotes are excluded from the Exchange's calculation of the NBBO, and to notify such other exchange that its quotes have been so excluded.

⁶ See letter from Richard S. Rudolph, Counsel, Phlx, to Nancy J. Sanow, Assistant Director, Division, Commission, dated April 2, 2002 ("Amendment No. 7"). In Amendment No. 7, the Exchange proposed to amend the rule text to provide that documentation of each instance in which another exchange's quotes are excluded from the Exchange's calculation of NBBO shall include: identification of the option(s) affected by such action; the date and time such action was taken and concluded; identification of the other exchange(s) whose quotes were excluded from the Exchange's calculation of NBBO; identification of the Chairman of the Options Committee, his designee, or two Floor Officials (as applicable) who approved such action; the reasons for which such action was taken; and identification of the specialist and the specialist unit.

⁷ At the request of the Phlx, these sections have been revised to conform to subsequent amendments. Telephone conversation among Deborah Flynn, Assistant Director, Division, Commission, Jennifer Lewis, Attorney, Division, Commission, and Richard S. Rudolph, Counsel, Phlx, on February 21, 2002.

⁸ See Securities Exchange Act Release No. 43684 (December 6, 2000), 65 FR 78237 ("Original Filing").

⁹ See letter from Richard S. Rudolph, Counsel, Phlx to Nancy J. Sanow, Assistant Director, Division, Commission, dated September 18, 2001 ("Amendment No. 3").

⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Richard S. Rudolph, Counsel, Phlx, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated January 15, 2002 ("Amendment No. 4"). In Amendment No. 4, the Exchange proposes to revise its proposed procedures for determining when quotes from away markets are excludable from the calculation of the National Best Bid or Offer ("NBBO"). Amendment No. 4 supersedes and replaces Amendment No. 3 in its entirety.

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

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

The Exchange proposes to ensure that customer orders would not be disqualified from receiving an automatic execution due to another market's dissemination of unreliable quotes. In the Original Filing, the Phlx proposed to permit the Chairman of the Options Committee or his designee (or if the Chairman of the Options Committee or his designee is unavailable, two Floor Officials) to rely on a variety of factors to determine that if quotes in certain automatic step-up options on the Exchange or other markets were deemed not to be reliable, such unreliable quotes would be excluded from the calculation of NBBO, and customers would receive an automatic execution at NBBO based on the remaining markets whose quotes were not deemed to be unreliable. The Phlx proposes to limit the factors that the Chairman of the Options Committee or his designee (or if the Chairman of the Options Committee or his designee is unavailable, two Floor Officials), may rely upon to determine that quotes in options on the Exchange or another market or markets are unreliable.¹⁰

The text of the proposed rule change, as modified by Amendment Nos. 4, 5, 6, and 7, is provided below. Text that has been added to the current Exchange rule is in italics.

Rule 1080 Philadelphia Stock Exchange Automated Options Market (AUTOM) and Automatic Execution System (AUTO-X)

(a)–(b) No change.

(c) No change.

(i) (A)–(C) No change.

(D) *Where the Chairman of the Options Committee or his designee (or if the Chairman of the Options Committee or his designee is unavailable, two Floor Officials), determines that quotes in options on the Exchange or another market or markets are subject to relief from the firm quote requirement set forth in the SEC Quote Rule, as defined in Exchange Rule 1082(a)(iii) (the "Quote Rule"), customer market orders will receive an automatic execution at NBBO based on the best bid or offer in markets whose quotes are not subject to relief from the firm quote requirement set forth in the Quote Rule. Such determination may be made by way of notification from another market that its quotes are not firm or are unreliable; administrative message from the Option Price Reporting Authority ("OPRA"); quotes received from another market*

designated as "not firm" using the appropriate indicator; and/or telephonic or electronic inquiry to, and verification from, another market that its quotes are not firm. AUTOM customers will be duly notified via electronic message from AUTOM that such quotes are excluded from the calculation of NBBO. The Exchange may determine to exclude quotes from its calculation of NBBO on a series-by-series basis or issue-by-issue basis, or may determine to exclude all options quotes from an exchange, where appropriate. The Exchange shall maintain a record of each instance in which another exchange's quotes are excluded from the Exchange's calculation of NBBO, and shall notify such other exchange that its quotes have been so excluded. Such documentation shall include: identification of the option(s) affected by such action; the date and time such action was taken and concluded; identification of the other exchange(s) whose quotes were excluded from the Exchange's calculation of NBBO; identification of the Chairman of the Options Committee, his designee, or two Floor Officials (as applicable) who approved such action; the reasons for which such action was taken; and identification of the specialist and the specialist unit. The Exchange will maintain these documents pursuant to the record retention requirements of the Securities Exchange Act of 1934 and the rules and regulations thereunder.

(E) Where the Chairman of the Options Committee or his designee (or if the Chairman of the Options Committee or his designee is unavailable, two Floor Officials), determines that quotes in options on the Exchange or another market or markets previously subject to relief from the firm quote requirement set forth in the Quote Rule are no longer subject to such relief, such quotations will be included in the calculation of NBBO for such options. Such determination may be made by way of notification from another market that its quotes are firm; administrative message from the Option Price Reporting Authority ("OPRA"); and/or telephonic or electronic inquiry to, and verification from, another market that its quotes are firm. AUTOM customers will be duly notified via electronic message from AUTOM that such quotes are again included in the calculation of NBBO.

(d)–(j) No change.

Commentary: No change.

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

In its filings 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.¹¹ 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.¹²

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

1. Purpose

In the Original Filing, the Phlx proposed an enhancement to AUTO-X, the automatic execution feature of the Exchange's Automated Options Market ("AUTOM") System, that would allow AUTO-X eligible orders to be automatically executed at the NBBO, provided that the NBBO is not better than the specialist's BBO by a predetermined "step-up parameter."¹³ The Commission granted accelerated approval to this part of the Original Filing.

In addition, in the Original Filing, the Phlx proposed to permit the Chairman of the Options Committee or his designee (or if the Chairman of the Options Committee or his designee is unavailable, two Floor Officials) to determine that if quotes in certain automatic step-up options on the Exchange or other markets were deemed not to be reliable, such unreliable quotes would be excluded from the calculation of NBBO, and customers would receive an automatic execution at NBBO based on the remaining markets whose quotes were not deemed to be unreliable. The original filing proposed that quotes would be determined to be unreliable due to Exchange communications or systems problems; fast markets; delays in the dissemination of quotes because of queues on the Options Price Reporting Authority ("OPRA") which would likely render such quotes stale; or if the Exchange is advised by another exchange that it is experiencing communication or system problems that would cause its disseminated quotes to be unreliable.

¹¹ See Original Filing, *supra* note 8.

¹² *Id.*

¹³ For a full discussion of Phlx's proposal, see the Original Filing.

¹⁰ See Amendment No. 4, *Supra* note 3.

The Phlx now proposes to limit the factors that the Chairman of the Options Committee or his designee (or if the Chairman of the Options Committee or his designee is unavailable, two Floor Officials), may rely upon to determine that quotes in options on the Exchange or another market or markets are unreliable.¹⁴ Such determination may be made by way of notification from another market that its quotes are not firm or are unreliable; administrative message from the Option Price Reporting Authority ("OPRA"); quotes received from another market designated as "not firm" using the appropriate indicator; and/or telephonic or electronic inquiry to, and verification from, another market that its quotes are not firm.¹⁵

In addition, AUTOM customers would be duly notified via electronic message from AUTOM that such quotes are excluded from the calculation of NBBO.

Further, where the Chairman of the Options Committee or his designee (or if the Chairman of the Options Committee or his designee is unavailable, two Floor Officials), determines that responsible brokers or dealers on the Exchange or another market or markets previously relieved of their obligations under the Commission's Quote Rule¹⁶ are no longer subject to such relief, the quotations of such responsible broker or dealer would be included in the calculation of the NBBO for such options. Such determination would be permitted to be made by way of notification from another market that its quotes are firm; administrative message from OPRA; and/or telephonic or electronic inquiry to, and verification from, another market that its quotes are firm.

AUTOM customers would be duly notified via electronic message from AUTOM that such quotes are again included in the calculation of NBBO.¹⁷

The Exchange also would be permitted to determine to exclude quotes from its calculation of the NBBO on a series-by-series basis or issue-by-issue basis, or to determine to exclude all options quotes from an exchange, where appropriate.¹⁸

The Phlx also proposes to require the Exchange to maintain a record of each instance in which another exchange's

quotes are excluded from the Exchange's calculation of the NBBO, and to notify such other exchange that its quotes have been so excluded.¹⁹

In addition, Phlx proposes to amend the rule text to provide that documentation of each instance in which another exchange's quotes are excluded from the Exchange's calculation of NBBO shall include: identification of the option(s) affected by such action; the date and time such action was taken and concluded; identification of the other exchange(s) whose quotes were excluded from the Exchange's calculation of NBBO; identification of the Chairman of the Options Committee, his designee, or two Floor Officials (as applicable) who approved such action; the reasons for which such action was taken; and identification of the specialist and the specialist unit. The Exchange will maintain these documents pursuant to the record retention requirements of the Securities Exchange Act of 1934 and the rules and regulations thereunder.²⁰

2. Statutory Basis

The Phlx believes that the proposed rule change, as amended, is consistent section 6(b) of the Act,²¹ in general, and furthers the objectives of Section 6(b)(5),²² in particular, because it is designed to perfect the mechanisms of a free and open market and the national market system, protect investors and the public interest and promote just and equitable principles of trade, by enhancing the Exchange's ability to provide automatic execution of public customers' orders at the best available prices.

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

The Phlx does not believe that the proposed rule change, as amended, will impose any burden on 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

The Exchange received one comment letter on the proposed rule change.²³ In its comment letter, CBOE recommended that the Phlx amend its rule to require

the Exchange to make and keep a written record of decisions to remove an exchange from the NBBO calculation and to notify an exchange when its markets have been removed from the Phlx's NBBO calculation. In response to CBOE's comments, Phlx proposed Amendment Nos. 5 and 6.

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

Within 35 days of the 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 Phlx consents, the Commission will: (A) by order approve the proposed rule change, as amended, or (B) institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment Nos. 4, 5, 6, and 7, including whether Amendment Nos. 4, 5, 6, and 7 are consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. 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 such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File Number SR-Phlx-00-93 and should be submitted by May 6, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁴

Margaret H. McFarland,

Deputy Secretary.

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²⁴ 17 CFR 200.30-3(a)(12).

¹⁴ See Amendment No. 4, *supra* note 3.

¹⁵ *Id.*

¹⁶ Rule 11Ac1-1 under the Act, 17 CFR 240.11Ac1-1.

¹⁷ For a full discussion of Phlx's proposal, see the Original Filing.

¹⁸ See Amendment No. 5, *supra* note 4.

¹⁹ See Amendment No. 6, *supra* note 5.

²⁰ See Amendment No. 7, *supra* note 6.

²¹ 15 U.S.C. 78f(b).

²² 15 U.S.C. 78f(b)(5).

²³ See letter from Edward J. Joyce, President and Chief Operating Officer, Chicago Board Options Exchange, Inc. ("CBOE"), to Mr. Jonathan G. Katz, Secretary, Commission, dated February 8, 2001.