

The proposed rule change also would require the person responsible for trade allocation in each trade (the "Allocating Participant") to circle his or her badge identification number on the trade tickets, thereby identifying him or herself as the Allocating Participant in the particular trade.¹³ If the Allocating Participant is not a participant in the trade (such as where a Floor Broker delegated responsibility for allocation to the specialist), the Allocating Participant would be required to identify him or herself by initialing the trade tickets.¹⁴

The purpose of adopting new subparagraph (vi) of rule 1014(g) is to codify Advice F-2 expressly into Exchange rules. Certain advices are merely restatements of Phlx rules, codified into Floor Procedure Advices, not just because they may have an associated fine schedule as part of the minor rule plan, but also for the convenience of members on the trading floor.¹⁵

The Exchange believes that the proposed fine schedule is appropriate, in light of the low level of the existing fines (with a first violation resulting in a fine of merely \$100), and the importance of the trade allocation function. The Exchange has recently increased most of its minor rule plan fine schedules.¹⁶ The Exchange is also proposing to adopt a separate fine schedule for paragraph (b) of Advice F-2, which deals with trade reporting, because the Exchange intends to administer its surveillance and enforcement of that provision separately.¹⁷

2. Statutory Basis

For these reasons, the Exchange believes that its proposal is consistent with section 6(b) of the Act¹⁸ in general and section 6(b)(5)¹⁹ in particular in that it is designed to promote just and equitable principles of trade, prevent fraudulent and manipulative acts and practices and protect investors and the public interest by establishing a structure for determining who allocates

options trades that permits the floor broker, who would generally perform the allocation, to delegate this responsibility to the specialist. Thus, the provision should promote prompt and accurate trade allocations, which in turn facilitates prompt trade reporting.

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

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 such 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 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 the filing will also be available for inspection and copying at the principal offices of the Phlx. All submissions should refer to File No.

SR-Phlx-2001-28 and should be submitted by April 15, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁰

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47499; File No. SR-Phlx-2001-39]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3, 4, 5, and 6 Thereto by the Philadelphia Stock Exchange, Inc. Relating to the Allocation of Trades

March 13, 2003.

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 12, 2001, 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 Phlx. On May 11, 2001, February 19, 2002, May 22, 2002, November 19, 2002, December 16, 2002, and February 25, 2003, Phlx submitted Amendment Nos. 1, 2, 3, 4, 5, and 6 to the proposed rule change, respectively.³ The Commission is publishing this

²⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letters from Richard S. Rudolph, Director and Counsel, Phlx, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated May 10, 2001 (Amendment No. 1), February 15, 2002 (Amendment No. 2), May 21, 2002 (Amendment No. 3), November 18, 2002 (Amendment No. 4), December 12, 2002 (Amendment No. 5), and February 24, 2003 (Amendment No. 6). The proposal, File No. SR-Phlx-2001-39, originally was filed to be immediately effective pursuant to section 19(b)(3)(A) of the Act, 15 U.S.C. 78s(b)(3)(A). In Amendment No. 1, Phlx amended the status of the proposed rule change to be filed pursuant to section 19(b)(2) of the Act, 15 U.S.C. 78s(b)(2), and requested accelerated effectiveness. In Amendment No. 2, Phlx consolidated a companion proposal, File No. SR-Phlx-2001-29, with the instant proposal to become a single proposed rule change and made several modifications. Phlx made additional changes to the rule text in Amendment No. 3 and, in Amendment No. 4, Phlx amended and restated the proposed rule change in its entirety. In Amendment No. 5, Phlx made revisions to clarify that all customer orders would be executed prior to the participation of the specialist and to delete references to Phlx rule 1064. In Amendment No. 6, Phlx made minor corrections to the rule text and narrative section of the proposal.

¹³ See Amendment No. 2.

¹⁴ See Amendment No. 3.

¹⁵ The advices were historically printed in pocket-sized versions for trading floor use. See, e.g., Advice B-6 and Phlx rule 1014(g)(ii) and Advice A-11 and Phlx rule 1015.

¹⁶ See Securities Exchange Act Release No. 44537 (July 11, 2001), 66 FR 37511 (July 18, 2001) (SR-Phlx-2001-36).

¹⁷ The Commission notes that the proposed fine for a third violation of paragraph (b) of Advice F-2 would be \$2,500, in contrast to the proposed fine of \$2,000 for a third violation of other provisions of Advice F-2.

¹⁸ 15 U.S.C. 78f(b).

¹⁹ 15 U.S.C. 78f(b)(5).

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

Phlx proposes to amend various provisions of Phlx rule 1014, "Obligations And Restrictions Applicable To Specialists And Registered Options Traders," and to make conforming changes to Options Floor Procedure Advice ("Advice") B-6 relating to the allocation of trades on the Exchange's Options Floor.

The text of the proposed rule change, as amended, follows.⁴ Additions are italicized, and deletions are enclosed in brackets.

* * * * *

Rule 1014. Obligations and Restrictions Applicable to Specialists and Registered Options Traders

(a)-(f) No change.

(g) Equity Option and Index Option Priority and Parity

(i) (A) Exchange Rules 119 and 120 direct members in the establishment of priority of orders on the floor. In addition, equity option and index option orders of controlled accounts are required to yield priority to customer orders when competing at the same price, as described below.

For the purpose of paragraph (g) of this Rule, "*Initiating Order*" means an incoming contra-side order. "*Remainder of the Order*" means the portion of an Initiating Order that remains following the allocation of contracts to customers that are on parity, in accordance with this Rule 1014(g)(i). The Remainder of the Order shall be allocated pursuant to this Rule 1014. [a] An account type is either a controlled account or a customer account. A controlled account includes any account controlled by or under common control with a broker-dealer. [Specialist accounts of PHLX Option Specialists, however, are not subject to yielding requirements placed upon controlled accounts by this Rule.] Customer accounts are all other accounts.

Orders of controlled accounts must yield priority to customer orders[, except that, PHLX ROTs closing in-person are not required to yield priority to orders of customer accounts].

Orders of controlled accounts are not required to yield priority to other

controlled account orders[, except that when both an order of a PHLX ROT closing in-person and some other order of a controlled account are established in the crowd at the same price, and then a customer order is established at that price, the order of the controlled account must yield to the customer order while the order of the PHLX ROT closing in-person does not have to so yield].

Orders of controlled accounts, other than ROTs and Specialists market making in person, must be (1) verbally communicated as for a controlled account when placed on the floor and when represented to the trading crowd and (2) recorded as for a controlled account by appropriately circling the "yield" field on the floor ticket of any such order.

Several programs described below provide an Enhanced Specialist Participation to specialists, which refers to the portion of an options trade available for allocation to the specialist on parity, including a 30% (which may actually result in a 40% or 60%) Enhanced Specialist Participation, New Unit/New Option Enhanced Specialist Participation, and New Product Enhanced Specialist Participation.

The Enhanced Specialist Participation is a percentage of the Remainder of the Order to which the specialist is entitled, depending upon whether (g)(ii), (iii), or (iv) applies.

(B) No change.

(ii) Enhanced Specialist Participation—In equity and index option classes, when the registered specialist is on parity with a controlled account as defined in subparagraph (i) above, in accordance with Exchange Rules 119 and 120 and the number of contracts to be bought or sold is greater than five, the specialist is entitled to receive an enhanced participation of 30% of the [initiating order] *Remainder of the Order* ("Enhanced Specialist Participation"), except in the following circumstances: (1) where there is one controlled account on parity, the specialist *is entitled to receive* [s] 60% of the [initiating order] *Remainder of the Order*; or (2) where there are two controlled accounts on parity, in which case, the specialist is entitled to *receive* 40% of the [initiating order] *Remainder of the Order*. [Further, no customer order which is on parity may receive a smaller participation than any other crowd participant including the specialist.] Enhanced Specialist Participation will be effective for: (a) all newly listed issues, (b) all index options and (c) such issues selected by the specialist and approved by the Allocation, Evaluation and Securities

Committee pursuant to section (A) below.

(A) The Allocation, Evaluation and Securities Committee shall divide each equity and index option specialist's registered issues into trading volume quartiles based upon the most recent quarterly customer contract volume. Each specialist may then select 50% of the issues in each quartile to receive Enhanced Specialist Participation, rounded so that no more than 50% of the total number of such specialists' registered issues are selected. The Allocation, Evaluation and Securities Committee shall approve all specialist selections.

(B) Pursuant to Exchange Rule 509, the Allocation, Evaluation and Securities Committee shall reduce the level of Enhanced Specialist Participation authorized under this Rule to a parity level of participation in accordance with Rules 119 and 120 with respect to any options class if the specialist in such class is determined to be performing below any minimum standards or not satisfying any conditions that the Exchange may establish with respect to any options class subject to Enhanced Specialist Participation. The Committee may reinstate Enhanced Specialist Participation for a particular options class if it determines that the specialist in such class is performing at or above all established minimum standards and is satisfying all established conditions.

(C) New specialist units trading new options classes shall *be entitled to* receive an [e]Enhanced [parity split] *Specialist Participation* in accordance with subparagraph (iii) of this Rule. Once the specialist unit is no longer eligible to receive an [e]Enhanced [parity split] *Specialist Participation* in accordance with subparagraph (iii), the unit is automatically entitled to an Enhanced Specialist [p]Participation in accordance with this subparagraph (ii).

(iii) New Unit/New Option Enhanced Specialist Participation—To encourage the establishment of new specialist units to trade equity and index option classes that heretofore have never been listed on the Exchange ("New Options Classes"), when such units are on parity with controlled accounts in such classes, the new specialist units will be entitled, for a period of six months following commencement of trading in New Option Classes, to the following [e]Enhanced [s]Specialist [p]Participation in a any such parity trade: (1) Fifty percent (50%) where there is one controlled account on parity and (2) Forty percent (40%) where there are two or more controlled accounts on parity[, except that no customer order

⁴ The proposed changes are set forth below as they would appear in the text of Phlx rule 1014 and in the text of Options Floor Procedure Advice B-6.

which is on parity may receive a smaller participation than any other crowd participant including the specialist]. The Allocation, Evaluation and Securities Committee may extend such [e]Enhanced [parity split] *Specialist Participation* for each applicable option beyond the initial six month period for one additional six month period upon petition by the specialist unit and a determination by the Committee that such extension is consistent with the promotion of just and equitable principles of trade and the public interest. Additionally, the Committee after granting such extension may at any time terminate such [e]Enhanced [parity split] *Specialist Participation* for any particular options class if the Committee determines that such action is consistent with the promotion of just and equitable principles of trade and the public interest.

(A)–(B) No change.

(C) a new specialist unit may receive the [e]Enhanced [s]Specialist [p]Participation in a New Options Class at the time that the New Options Class commences trading.

(D) a new specialist unit will be entitled to receive the [e]Enhanced [s]Specialist [p]Participation for any additional New Options Classes so long as such options classes commence trading at a time when the unit is still entitled to receive the [e]Enhanced [s]Specialist [p]Participation on the first New Options Class it commenced trading.

(iv) New Product Enhanced Specialist Participation—When a specialist unit develops and trades a new product, such specialist [will] *is entitled to* receive an [e]Enhanced [split] *Specialist Participation* in that option such that when the specialist is on parity with three or more controlled accounts in the crowd, the specialist *is entitled to* receive[s] 40% of the contracts and the controlled accounts are entitled to receive the remaining 60%; when the specialist is on parity with less than three controlled accounts in the crowd, the specialist *is entitled to* receive[s] 60% of the contracts and the controlled accounts *are entitled to* receive the remaining 40%. [In either of these situations, if a customer is on parity, the customer may not receive a lesser allotment than any other crowd participant, including the specialist.] In order for the [enhancement] *Enhanced Specialist Participation* to apply, the specialist must both develop and trade a new product. If one specialist unit develops a new product idea and another specialist is allocated specialist privileges in the product, the specialist unit trading the product would not be

entitled to [this split] *receive an Enhanced Specialist Participation*. The Options Committee will determine whether a specialist “developed” a new product.

(v) *Allocation of the Remainder of the Order Among Specialist and ROTs on Parity. After the application of Rule 1014(g)(i) to an Initiating Order, the Remainder of the Order shall be allocated by the Allocating Participant (as defined in Rule 1014(g)(vi)) as follows:*

(A) *Entitlement. ROTs and specialists on parity are entitled to their Defined Participation (as described below), subject to: (1) any Waiver, as described below; and (2) rounding, as described below.*

(B) *Size. The term “stated size” in relation to a crowd participant and in respect of an order shall mean:*

(1) *in the case of orders handled manually by the specialist:*

(a) *if a crowd participant (including the specialist) has actually stated a size (“Actual Size”), such crowd participant’s stated size shall be his or her Actual Size;*

(b) *unless the specialist has an Actual Size, the stated size of the specialist shall be the amount (if any) by which the disseminated size exceeds the sum of (x) the aggregate size of limit orders included in the disseminated size and (y) the aggregate sizes of all ROTs who have Actual Sizes;*

(c) *the stated size of an ROT who does not have an Actual Size is zero.*

(2) *in the case of floor brokered orders, each crowd participant’s stated size shall be his or her Actual Size.*

(C) *Defined Participation. Defined Participation is the portion of the Remainder of the Order to which a crowd participant is entitled. Defined Participation is determined as follows:*

(1) *in the case of a specialist entitled to an Enhanced Specialist Participation, the Enhanced Specialist Participation, up to the specialist’s stated size, as set forth in sub-paragraphs (g)(ii), (iii), or (iv) of this Rule, as applicable. The specialist may decline to receive the Enhanced Specialist Participation, in which case the specialist shall be entitled to participate as one crowd participant, up to the specialist’s stated size.*

(2) *except as provided in (1) above, the Defined Participation of the specialist and ROTs on parity is determined as follows:*

(a) *where all participants have equal stated sizes, their Defined Participations shall be equal;*

(b) *where participants have unequal stated sizes, the Defined Participations shall equal their Base Participations (as*

defined below) plus their Supplemental Participations (as defined below):

(i) *the “Base Participations” of all of the participants shall equal the stated size of the smallest participant; to the extent that there remains any excess to be allocated after all participants have been allocated their Base Participations, the smallest participant shall have no Supplemental Participation, and the other participants shall have “Supplemental Participations” as determined under (ii) and (iii) below;*

(ii) *if the remaining stated sizes (i.e., after taking into account Base Participations) of all participants having Supplemental Participations is equal, then their Supplemental Participations shall be equal; otherwise the initial Supplemental Participations of such participants shall equal the remaining stated size of the smallest such participant; to the extent that there remains any excess to be allocated after all participants have been allocated their initial Supplemental Participations, the smallest participant shall have no further Supplemental Participation, and the other participants shall have further “Supplemental Participations” as determined under (iii) below; and (iii) if the remaining stated sizes (i.e., after taking into account Base Participations and prior Supplemental Participations) of all participants having further Supplemental Participations is equal, then their further Supplemental Participations shall be equal; otherwise the next Supplemental Participations of such participants shall equal the remaining stated size of the smallest such participant; to the extent that there remains any excess to be allocated after all participants have been allocated the next Supplemental Participations, the smallest participant shall have no further Supplemental Participation, and the other participants shall have successive further Supplemental Participations determined in the same manner as provided in this clause (iii).*

The process described in clause (iii) shall be followed to determine successive further Supplemental Participations until the sum of the Defined Participations equals the amount of the Remainder of the Order.

(iv) (a) *If the sum of the Base Participations pursuant to sub-paragraph (i) above exceeds the number of contracts remaining to be allocated, such contracts shall be divided equally among crowd participants who are entitled to receive Base Participations, subject to rounding.*

(b) *If the sum of the Supplemental Participations pursuant to sub-paragraph (ii) above exceeds the*

number of contracts remaining to be allocated, such contracts shall be divided equally among crowd participants who are entitled to receive Supplemental Participations, subject to rounding.

(c) If the sum of the further Supplemental Participations pursuant to sub-paragraph (iii) above exceeds the number of contracts remaining to be allocated, such contracts shall be divided equally among crowd participants who are entitled to receive further Supplemental Participations, subject to rounding.

(3) Participation in additional contracts in excess of the Exchange's disseminated size among willing crowd participants shall be allocated under the applicable provisions of this Rule 1014. Notwithstanding the limitation set forth in sub-paragraph (C)(1) that limits the specialist's entitlement to his/her stated size, for all contracts executed in excess of the disseminated size, the specialist shall be entitled to receive the Enhanced Specialist Participation as set forth in sub-paragraphs (g)(ii), (iii), or (iv) of this Rule, as applicable, but not to exceed the specialist's Actual Size (if the specialist has an Actual Size) in such excess contracts.

(D) Waiver. (1) Any ROT or specialist may, in his or her sole discretion, offer to waive, in whole or in part, any part of a trade to which they were entitled to be allocated (an "Offer to Waive").

(a) Any Offer to Waive shall be made by stating it in a loud and audible voice to the other members of the trading crowd and the Allocating Participant.

(b) If the Allocating Participant has determined that the other crowd participant(s) then on parity is willing to take the number of contracts that are subject to the Offer to Waive, the Allocating Participant may (but shall not be required to), accept such Offer to Waive by (i) allocating the Remainder of the Order in accordance with this rule 1014(g)(v), taking into account the Offer to Waive; or (ii) otherwise indicating, following the execution of the Remainder of the Order, that such Offer to Waive will be accepted (in which case, it shall be referred to as a "Waiver"). No Offer to Waive shall be an effective Waiver until the Allocating Participant has allocated the order or otherwise indicated that it is accepted.

(c)(i) In the case of an option which is not subject to an Enhanced Specialist Participation, as set forth in sub-paragraphs (g)(ii)–(iv) of this Rule, if the specialist or an ROT effects a Waiver in the manner provided above, the number of contracts to which such specialist or ROT is entitled under this Rule 1014(g)(v) shall be reduced by the

number of contracts waived, and the entitlements of the other participants on parity shall be determined by redistributing the waived number of contracts to willing participants (including the specialist) in accordance with this Rule 1014(g)(v).

(ii) In the case of an option which is subject to an Enhanced Specialist Participation, as set forth in sub-paragraphs (g)(ii)–(iv) of this Rule, and one or more ROTs effect Waivers of their entire entitlements ("Total Waivers"), the number of ROTs with whom the specialist is deemed to be on parity for purposes of determining the Enhanced Specialist Participation shall be reduced by the number of ROTs effecting Total Waivers and the following additional rules shall apply:

(A) In the event that one or more ROTs on parity with the specialist effect a Total Waiver of their respective entitlements such that the specialist is on parity with three or more ROTs, the number of contracts to be allocated to each crowd participant shall be determined as provided in sub-paragraph (c)(i) above, provided that the maximum number of contracts to be allocated to the specialist shall be that which the specialist would be entitled to receive under Rule 1014(g)(ii)–(iv), as if the specialist had been on parity with three ROTs.

(B) In the event that one or more ROTs on parity with the specialist effect a Total Waiver of their respective entitlements such that the specialist is on parity with two ROTs, the number of contracts to be allocated to each crowd participant shall be determined as provided in sub-paragraph (c)(i) above, provided that the maximum number of contracts to be allocated to the specialist shall be that which the specialist would be entitled to receive under Rule 1014(g)(ii)–(iv) as if the specialist had been on parity with two ROTs.

(C) In the event that one or more ROTs on parity with the specialist effect a Total Waiver of their respective entitlements such that the specialist is on parity with one ROT, the number of contracts to be allocated to each crowd participant shall be determined as provided in sub-paragraph (c)(i) above, provided that the maximum number of contracts to be allocated to the specialist shall be that which the specialist would be entitled to receive under Rule 1014(g)(ii)–(iv) as if the specialist had been on parity with one ROT. In no event shall any non-waiving ROT be required to participate in fewer contracts than he/she would have received absent the Waiver(s).

(iii) Partial Waiver. In the case of an option which is subject to an Enhanced Specialist Participation, in the event that one or more ROTs effect a Waiver of a portion of their respective entitlements, but not a Total Waiver, in the manner provided above (a "Partial Waiver"), the number of contracts to be allocated to each crowd participant shall be determined as provided in sub-paragraph (c)(i) above, provided that the specialist shall not be entitled to receive a number of contracts that is greater than 40% of the Remainder of the Order except in the situation referred to in the following sentence, unless all remaining crowd participants on parity have waived their entitlements or have been satisfied. In the case of the specialist being on parity with only one ROT, the specialist shall not be entitled to receive a number of contracts that is greater than 60% of the Remainder of the Order unless all remaining crowd participants on parity have waived their entitlements or have been satisfied.

In no event shall any non-waiving ROT be required participate in fewer contracts than he/she would have received absent the Partial Waiver(s).

(iv) In no event shall two or more crowd participants enter into any agreement regarding the number of contracts to be waived by any crowd participant (i.e., subject to the provisions of subparagraph (D)(1)(b) above, any decision by a crowd participant to waive all or a portion of such crowd participant's entitlement must be an individual decision, and not the subject of an agreement among crowd participants).

(E) Rounding. In situations where the allocation of contracts pursuant to this Rule result in fractional amounts of contracts to be allocated to crowd participants, the number of contracts to be allocated shall be rounded in a fair and equitable manner.

(F) Just and Equitable Principles of Trade. (1) It shall be considered conduct inconsistent with just and equitable principles of trade for a member: (a) to allocate initiating orders other than in accordance with this rule 1014; (b) to enter into any agreement with another member concerning allocation of trades; or (c) to harass, intimidate or coerce any member to enter into any Waiver, or to make or refrain from making any complaint or appeal.

(2) A pattern or practice of waiving all or a portion of a crowd participant's entitlement, with the result that such crowd participant receives no allocation or a lesser allocation than he or she would otherwise have been entitled to, may be considered conduct inconsistent

with just and equitable principles of trade.

(G) Notwithstanding the first sentence of Rule 1014(g)(i), neither Rule 119(b) and (c) concerning precedence based on the size of bids on parity, nor Rule 120 (insofar as it incorporates those provisions by reference) shall apply to the allocation of orders covered by this Rule 1014(g)(v).

* * * * *

B-6 Priority of Options Orders for Equity Options and Index Options by Account Type (Equity Option and Index Option Only)

(i) Exchange Rules 119 and 120 direct members in the establishment of priority of orders on the floor. In addition, equity option and index option orders of controlled accounts are required to yield priority to customer orders when competing at the same price, as described below.

For the purposes of this Advice, "Initiating Order" means an incoming contra-side order. "Remainder of the Order" means the portion of an Initiating Order that remains following the allocation of contracts to customers that are on parity, in accordance with this Rule 1014(g)(i). The Remainder of the Order shall be allocated pursuant to this Rule 1014. [a]An account type is either a controlled account or a customer account. A controlled account includes any account controlled by or under common control with a broker-dealer. [Specialist accounts of PHLX Option Specialists, however, are not subject to yielding requirements placed upon controlled accounts by this Rule.] Customer accounts are all other accounts.

Section A

(i) Orders of controlled accounts must yield priority to customer orders[, except that, PHLX ROTs closing in-person are not required to yield priority to orders of customer accounts].

(ii) Orders of controlled accounts are not required to yield priority to other controlled account orders[, except that when both an order of a PHLX ROT closing in-person and some other order of a controlled account are established in the crowd at the same price, and then a customer order is established at that price, the order of the controlled account must yield to the customer order while the order of the PHLX ROT closing in-person does not have to so yield].

Section B

Orders of controlled accounts, other than ROTs and Specialists market making in-person, must be—

(1) verbally communicated as for a controlled account when placed on the floor and when represented to the trading crowd and

(2) recorded as for a controlled account by appropriately circling the "yield" field on the floor ticket of any such order.

In any instance where an order is misrepresented in this fashion due to factors which give rise to the concern that it was the result of anything other than an inadvertent error, the Exchange may determine to bypass the fine schedule below and refer the incident to the Business Conduct Committee for possible disciplinary proceedings in accordance with those procedures set forth under the Exchange's Disciplinary Rule 960.

Section C

Several programs described below provide an Enhanced Specialist Participation to specialists, which refers to the portion of an options trade available for allocation to the specialist on parity, including a 30% (which may actually result in a 40% or 60%) Enhanced Specialist Participation, New Unit/New Option Enhanced Specialist Participation, and New Product Enhanced Specialist Participation.

The Enhanced Specialist Participation is a percentage of the Remainder of the Order to which the specialist is entitled, depending upon whether (g)(ii), (iii), or (iv) applies.

Enhanced Specialist Participation—In equity and index option classes, when the registered specialist is on parity with a controlled account as defined in subparagraph (i) above, in accordance with Exchange Rules 119 and 120 and the number of contracts to be bought or sold is greater than five, the specialist is entitled to receive an enhanced participation of 30% of the [initiating order] Remainder of the Order ("Enhanced Specialist Participation"), except in the following circumstances:

(1) where there is one controlled account on parity, the specialist is entitled to receive[s] 60% of the [initiating order] Remainder of the Order; or (2) where there are two controlled accounts on parity, in which case, the specialist is entitled to receive 40% of the [initiating order] Remainder of the Order. [Further, no customer order which is on parity may receive a smaller participation than any other crowd participant including the specialist.] Enhanced Specialist Participation will be effective for: (a) all newly listed issues, (b) all index options and (c) such issues selected by the specialist and approved by the Allocation, Evaluation and Securities

Committee pursuant to section (A) below.

Section D

New Product Enhanced Specialist Participation "When a specialist unit develops and trades a new product, such specialist [will] is entitled to receive an[e]Enhanced [split] Specialist Participation in that option such that when the specialist is on parity with three or more controlled accounts in the crowd, the specialist is entitled to receive[s] 40% of the contracts and the controlled accounts are entitled to receive the remaining 60%; when the specialist is on parity with less than three controlled accounts in the crowd, the specialist is entitled to receive[s] 60% of the contracts and the controlled accounts are entitled to receive the remaining 40%. [In either of these situations, if a customer is on parity, the customer may not receive a lesser allotment than any other crowd participant, including the specialist.] In order for the [enhancement] Enhanced Specialist Participation to apply, the specialist must both develop and trade a new product. If one specialist unit develops a new product idea and another specialist is allocated specialist privileges in the product, the specialist unit trading the product would not be entitled to [this split] receive an Enhanced Specialist Participation. [The Options Committee will determine whether a specialist split.] The Options Committee will determine whether a specialist "developed" a new product.

Section E

Allocation of the Remainder of the Order Among Specialist and ROTs on Parity. After the application of this Advice to an Initiating Order, the Remainder of the Order shall be allocated by the Allocating Participant (as defined in Rule 1014(g)(vi)) as follows:

(A) Entitlement. ROTs and specialists on parity are entitled to their Defined Participation (as described below), subject to: (1) any Waiver, as described below; and (2) rounding, as described below.

(B) Size. The term "stated size" in relation to a crowd participant and in respect of an order shall mean:

(1) In the case of orders handled manually by the specialist:

(a) if a crowd participant (including the specialist) has actually stated a size ("Actual Size"), such crowd participant's stated size shall be his or her Actual Size;

(b) unless the specialist has an Actual Size, the stated size of the specialist shall be the amount (if any) by which

the disseminated size exceeds the sum of (x) the aggregate size of limit orders included in the disseminated size and (y) the aggregate sizes of all ROTs who have Actual Sizes;

(c) the stated size of an ROT who does not have an Actual Size is zero.

(2) in the case of floor brokered orders, each crowd participant's stated size shall be his or her Actual Size.

(C) Defined Participation. Defined Participation is the portion of the Remainder of the Order to which a crowd participant is entitled. Defined Participation is determined as follows:

(1) in the case of a specialist entitled to an Enhanced Specialist Participation, the Enhanced Specialist Participation, up to the specialist's stated size, as set forth in C and D of this Advice, as applicable. The specialist may decline to receive the Enhanced Specialist Participation, in which case the specialist shall be entitled to participate as one crowd participant, up to the specialist's stated size.

(2) except as provided in (1) above, the Defined Participation of the specialist and ROTs on parity is determined as follows:

(a) where all participants have equal stated sizes, their Defined Participations shall be equal;

(b) where participants have unequal stated sizes, the Defined Participations shall equal their Base Participations (as defined below) plus their Supplemental Participations (as defined below):

(i) the "Base Participations" of all of the participants shall equal the stated size of the smallest participant; to the extent that there remains any excess to be allocated after all participants have been allocated their Base Participations, the smallest participant shall have no Supplemental Participation, and the other participants shall have "Supplemental Participations" as determined under (ii) and (iii) below;

(ii) if the remaining stated sizes (i.e., after taking into account Base Participations) of all participants having Supplemental Participations is equal, then their Supplemental Participations shall be equal; otherwise the initial Supplemental Participations of such participants shall equal the remaining stated size of the smallest such participant; to the extent that there remains any excess to be allocated after all participants have been allocated their initial Supplemental Participations, the smallest participant shall have no further Supplemental Participation, and the other participants shall have further "Supplemental Participations" as determined under (iii) below; and (iii) if the remaining stated sizes (i.e., after taking into

account Base Participations and prior Supplemental Participations) of all participants having further Supplemental Participations is equal, then their further Supplemental Participations shall be equal; otherwise the next Supplemental Participations of such participants shall equal the remaining stated size of the smallest such participant; to the extent that there remains any excess to be allocated after all participants have been allocated the next Supplemental Participations, the smallest participant shall have no further Supplemental Participation, and the other participants shall have successive further Supplemental Participations determined in the same manner as provided in this clause (iii).

The process described in clause (iii) shall be followed to determine successive further Supplemental Participations until the sum of the Defined Participations equals the amount of the Remainder of the Order.

(iv) (a) If the sum of the Base Participations pursuant to subparagraph (i) above exceeds the number of contracts remaining to be allocated, such contracts shall be divided equally among crowd participants who are entitled to receive Base Participations, subject to rounding.

(b) If the sum of the Supplemental Participations pursuant to subparagraph (ii) above exceeds the number of contracts remaining to be allocated, such contracts shall be divided equally among crowd participants who are entitled to receive Supplemental Participations, subject to rounding.

(c) If the sum of the further Supplemental Participations pursuant to subparagraph (iii) above exceeds the number of contracts remaining to be allocated, such contracts shall be divided equally among crowd participants who are entitled to receive further Supplemental Participations, subject to rounding.

(3) Participation in additional contracts in excess of the Exchange's disseminated size among willing crowd participants shall be allocated under the applicable provisions of this Advice. Notwithstanding the limitation set forth in subparagraph (C)(1) that limits the specialist's entitlement to his/her stated size, for all contracts executed in excess of the disseminated size, the specialist shall be entitled to receive the Enhanced Specialist Participation as set forth in sections C and D of this Advice, as applicable, but not to exceed the specialist's Actual Size (if the specialist has an Actual Size) in such excess contracts.

(D) Waiver. (1) Any ROT or specialist may, in his or her sole discretion, offer to waive, in whole or in part, any part of a trade to which they were entitled to be allocated (an "Offer to Waive").

(a) Any Offer to Waive shall be made by stating it in a loud and audible voice to the other members of the trading crowd and the Allocating Participant.

(b) If the Allocating Participant has determined that the other crowd participant(s) then on parity is willing to take the number of contracts that are subject to the Offer to Waive, the Allocating Participant may (but shall not be required to), accept such Offer to Waive by (i) allocating the Remainder of the Order in accordance with this Advice, taking into account the Offer to Waive; or (ii) otherwise indicating, following the execution of the Remainder of the Order, that such Offer to Waive will be accepted (in which case, it shall be referred to as a "Waiver"). No Offer to Waive shall be an effective Waiver until the Allocating Participant has allocated the order or otherwise indicated that it is accepted.

(c) (i) In the case of an option which is not subject to an Enhanced Specialist Participation, as set forth in sections C and D of this Advice, if the specialist or an ROT effects a Waiver in the manner provided above, the number of contracts to which such specialist or ROT is entitled under this Advice shall be reduced by the number of contracts waived, and the entitlements of the other participants on parity shall be determined by redistributing the waived number of contracts to willing participants (including the specialist) in accordance with this Advice.

(ii) In the case of an option which is subject to an Enhanced Specialist Participation, as set forth in sections C and D of this Advice, and one or more ROTs effect Waivers of their entire entitlements ("Total Waivers"), the number of ROTs with whom the specialist is deemed to be on parity for purposes of determining the Enhanced Specialist Participation shall be reduced by the number of ROTs effecting Total Waivers and the following additional rules shall apply:

(A) In the event that one or more ROTs on parity with the specialist effect a Total Waiver of their respective entitlements such that the specialist is on parity with three or more ROTs, the number of contracts to be allocated to each crowd participant shall be determined as provided in subparagraph (c)(i) above, provided that the maximum number of contracts to be allocated to the specialist shall be that which the specialist would be entitled to receive under this Advice, as if the

specialist had been on parity with three ROTs.

(B) In the event that one or more ROTs on parity with the specialist effect a Total Waiver of their respective entitlements such that the specialist is on parity with two ROTs, the number of contracts to be allocated to each crowd participant shall be determined as provided in sub-paragraph (c)(i) above, provided that the maximum number of contracts to be allocated to the specialist shall be that which the specialist would be entitled to receive under this Advice as if the specialist had been on parity with two ROTs.

(C) In the event that one or more ROTs on parity with the specialist effect a Total Waiver of their respective entitlements such that the specialist is on parity with one ROT, the number of contracts to be allocated to each crowd participant shall be determined as provided in sub-paragraph (c)(i) above, provided that the maximum number of contracts to be allocated to the specialist shall be that which the specialist would be entitled to receive under this Advice as if the specialist had been on parity with one ROT. In no event shall any non-waiving ROT be required to participate in fewer contracts than he/she would have received absent the Waiver(s).

(iii) *Partial Waiver.* In the case of an option which is subject to an Enhanced Specialist Participation, in the event that one or more ROTs effect a Waiver of a portion of their respective entitlements, but not a Total Waiver, in the manner provided above (a "Partial Waiver"), the number of contracts to be allocated to each crowd participant shall be determined as provided in sub-paragraph (c)(i) above, provided that the specialist shall not be entitled to receive a number of contracts that is greater than 40% of the Remainder of the Order except in the situation referred to in the following sentence, unless all remaining crowd participants on parity have waived their entitlements or have been satisfied. In the case of the specialist being on parity with only one ROT, the specialist shall not be entitled to receive a number of contracts that is greater than 60% of the Remainder of the Order unless all remaining crowd participants on parity have waived their entitlements or have been satisfied.

In no event shall any non-waiving ROT be required participate in fewer contracts than he/she would have received absent the Partial Waiver(s).

(iv) In no event shall two or more crowd participants enter into any agreement regarding the number of contracts to be waived by any crowd participant (i.e., subject to the

provisions of sub-paragraph (D)(1)(b) above, any decision by a crowd participant to waive all or a portion of such crowd participant's entitlement must be an individual decision, and not the subject of an agreement among crowd participants).

(E) *Rounding.* In situations where the allocation of contracts pursuant to this Rule result in fractional amounts of contracts to be allocated to crowd participants, the number of contracts to be allocated shall be rounded in a fair and equitable manner.

(F) *Just and Equitable Principles of Trade.* (1) It shall be considered conduct inconsistent with just and equitable principles of trade for a member: (a) to allocate initiating orders other than in accordance with this Advice; (b) to enter into any agreement with another member concerning allocation of trades; or (c) to harass, intimidate or coerce any member to enter into any Waiver, or to make or refrain from making any complaint or appeal.

(2) A pattern or practice of waiving all or a portion of a crowd participant's entitlement, with the result that such crowd participant receives no allocation or a lesser allocation than he or she would otherwise have been entitled to, may be considered conduct inconsistent with just and equitable principles of trade.

(G) Notwithstanding the first sentence of this Advice, neither Rule 119(b) and (c) concerning precedence based on the size of bids on parity, nor Rule 120 (insofar as it incorporates those provisions by reference) shall apply to the allocation of orders covered by this Advice.

Fine Schedule (Implemented on a Two-Year Running Calendar Basis) B-6

Section A:

No fine applicable. Matters subject for review by the Business Conduct Committee.

Section B:

1st Occurrence—\$500.00
2nd Occurrence—\$1,000.00
3rd Occurrence—\$2,000.00
4th Occurrence and thereafter—
Sanction is discretionary with
Business Conduct Committee.

Section C:

Fine not applicable.

Section D:

Fine not applicable.

Section E:

Fine not applicable.

* * * * *

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, as amended, 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 purpose of the proposed rule change is to codify certain practices that have developed respecting the allocation of trades on the Exchange's options floor and the Exchange's parity and priority rule, Phlx rule 1014, "Obligations And Restrictions Applicable To Specialists And Registered Options Traders." The proposed rule change also would make certain other changes to Phlx rule 1014 that would generally clarify option trade allocation procedures and make them easier to apply.⁵

As a general principle, in an auction market for standardized options like Phlx and other national securities exchanges operating a floor-based options marketplace, the first participant to quote the best price (highest bid or lowest offer) is entitled to priority, which refers to the right to participate fully in a contra-side order before anyone else. Phlx rules 119 and 120 and rule 1014(g) are the general rules concerning establishment of parity and priority in the execution of orders

⁵ On September 11, 2000, the Commission issued an order in relation to settling *In the Matter of Certain Activities of Options Exchanges*, which requires the Exchange (among other respondent options exchanges) to implement certain undertakings. Order Instituting Public Administrative Proceedings Pursuant to section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions, Securities Exchange Act Release No. 43268 (September 11, 2000) ("Order"). One such undertaking is to adopt new or amend existing rules to include any practice or procedure, not currently authorized by rule, whereby market makers trading any particular option class determine by agreement the spreads or option prices at which they will trade any option, or the allocation of orders in that option class. The proposed rule change, as amended, is intended to respond to this undertaking.

on the options floor.⁶ In addition to addressing time priority, these rules provide that when bids or offers at the same price are made simultaneously, or when the order of time in which bids or offers were made cannot be determined, all such bids and offers will be on parity. Thus, parity means that none of the market participants bidding or offering at the best price has rights over the other members at that price in terms of trade participation. Although not specifically stated in Phlx rules currently, members on parity are generally entitled to receive equal shares of the contra-side participation.⁷

An "Enhanced Specialist Participation" is one type of exception to the general parity rules, allocating to the specialist a greater than equal share of the portion of an order that is divided among the specialist and any "controlled accounts" that are on parity.⁸ The Exchange currently has several Enhanced Specialist Participation programs, embodied in Phlx rule 1014(g) and described below. These programs establish specified percentages as the Enhanced Specialist

Participation, depending on the category of option.

i. *Enhanced Specialist Participation Programs.* The Enhanced Specialist Participation provided under rule 1014(g)(ii) currently entitles the specialist to 30% of the portion of the initiating order,⁹ divided among the specialist and controlled accounts when three or more controlled accounts are on parity with the specialist and more than five contracts are to be bought or sold.¹⁰ This is generally known as the "30% Enhanced Specialist Participation" or the "30% split." If two controlled accounts are on parity with the specialist, the specialist is entitled to receive 40%, and if only one controlled account is on parity with the specialist, the specialist is entitled to receive 60%.

Another Enhanced Specialist Participation program on Phlx, originally adopted in May 1994 and embodied in current Phlx rule 1014(g)(iii), is designed to encourage the establishment of new specialist units to trade options classes that have never been listed on the Exchange. For a period of six months following the commencement of trading in such a new options class, the new specialist unit is entitled to 50% of an order when one controlled account is on parity with the specialist, and 40% when two or more

controlled accounts are on parity with the specialist.¹¹

On July 1, 1999, still another enhanced participation program, the "New Product Enhanced Specialist Participation," was adopted.¹² Under Phlx rule 1014(g)(iv), a specialist who develops and trades a new product is entitled to receive an Enhanced Specialist Participation of 40% when three or more controlled accounts are on parity, and 60% if fewer than three controlled accounts are on parity. Currently, in either of these situations, if a customer is on parity, the customer may not receive a smaller participation than any other crowd participant, including the specialist.¹³

The Exchange represents that the purpose of these programs is to attract and retain highly capitalized specialist units who can capture order flow for the Exchange. Because the specialist unit is currently the key party responsible for marketing to attract order flow in particular options, the Exchange seeks to provide the appropriate encouragement to specialists to plan, invest in, and effect marketing strategies. Therefore, the Exchange believes that these programs provide specialists with the appropriate incentive to create more depth and liquidity. Phlx states that the Commission has regularly acknowledged the need for well-capitalized specialist units, burdens and costs borne by specialists, and how the Enhanced Specialist Participation is intended to compensate specialists for these costs and burdens.¹⁴

(ii) *Clarifying Amendments.* The Exchange proposes to make clarifying amendments to Phlx rule 1014(g) to state what portion of a trade a specialist on parity with other crowd participants "is entitled to" throughout the Enhanced Specialist Participation portions of the rule. Most of the provisions in Phlx rule 1014(g)(ii) state the Enhanced Specialist Participation in the form of an entitlement, but the provisions that erroneously do not are

⁶ Phlx rule 1067, which states that the highest bid and the lowest offer shall have precedence in all cases, does not address parity situations, nor does it address size precedence; thus, it is consistent with the proposal. Other Exchange rules, including Phlx rules 1017 and 1019, as well as Advices A-12 and A-14, deal with priority/parity on the opening.

⁷ The Exchange notes that option orders that are automatically executed by the Exchange's AUTO-X system are generally subject to a separate allocation system known as the "Wheel." Therefore, the Enhanced Specialist Participation programs described in this section apply only to non-AUTO-X trades. Non-AUTO-X trades include manually executed trades such as orders delivered by the AUTOM System, by the Floor Broker Order Entry ("FBOE") System as well as manually to the specialist. See *infra* note 26 and Securities Exchange Act Release No. 41524 (June 14, 1999), 64 FR 33127 (June 21, 1999) (SR-Phlx-99-11) (adopting the FBOE). See also Securities Exchange Act Release No. 45927 (May 15, 2002), 67 FR 36289 (May 23, 2002) (SR-Phlx-2001-24).

The Exchange further notes that rules relating to its "ROT Access" system, in which specialists and Registered Options Traders ("ROT's") may place price improving limit orders and matching orders directly onto the limit order book via electronic interface with AUTOM, contain Special Allocation rules particular to orders executed against such price improving and matching orders. See Securities Exchange Act Release No. 46763 (November 1, 2002), 67 FR 68898 (November 13, 2002) (SR-Phlx-2002-04).

⁸ A controlled account is currently defined as "any account controlled by or under common control with a broker-dealer." See Phlx rule 1014(g)(i). Thus, the definition of controlled account includes the account of an ROT. See also Securities Exchange Act Release No. 45114 (November 28, 2001), 66 FR 63277 (December 5, 2001) (SR-Phlx-2001-38) (re-defining "controlled account"). For other examples of exceptions to the general parity principle, see Securities Exchange Act Release No. 43100 (July 31, 2000), 65 FR 48778 (SR-Phlx-00-01) at IV.B.2.

⁹ The proposal would specify that the specialist is entitled to receive an Enhanced Specialist Participation as a percentage of the "Remainder of the Order."

¹⁰ The 30% enhanced participation when three or more controlled accounts are on parity was approved by the Commission on April 18, 2000. See Securities Exchange Act Release No. 42700 (April 18, 2000), 65 FR 24246 (April 25, 2000) (SR-Phlx-99-39). The Enhanced Specialist Participation in Phlx rule 1014(g)(ii) was originally approved by the Commission as a one-year pilot program for equity options. See Securities Exchange Act Release No. 34606 (August 26, 1994), 59 FR 45741 (September 2, 1994) (SR-Phlx-94-12). It was later expanded to include index options. See Securities Exchange Act Release No. 35028 (November 30, 1994), 59 FR 63151 (December 7, 1994) (SR-Phlx-94-57). The pilot rule provided for a "two-for-one" split when the specialist was on parity with any number of controlled accounts, allocating to the specialist two contracts for every one allocated to a controlled account. The program was later revised to provide for the current 40% allocation when two controlled accounts are on parity and 60% allocation when one is on parity. See Securities Exchange Act Release No. 35429 (March 1, 1995), 60 FR 12802 (March 8, 1995) (SR-Phlx-94-59). The pilot was renewed unaltered on three occasions. See Securities Exchange Act Release Nos. 36122 (August 18, 1995), 60 FR 44530 (August 28, 1995) (SR-Phlx-95-54); 37254 (August 5, 1996), 61 FR 42080 (August 13, 1996) (SR-Phlx-96-29); and 38924 (August 11, 1997), 62 FR 44160 (August 19, 1997) (SR-Phlx-97-36). It was thereafter extended for another period with certain modifications. See Securities Exchange Act Release No. 39401 (December 4, 1997), 62 FR 65300 (December 11, 1997) (SR-Phlx-97-48). The pilot was approved as a permanent program on July 1, 1999. See Securities Exchange Act Release No. 41588 (July 1, 1999), 64 FR 37185 (July 9, 1999) (SR-Phlx-98-56).

¹¹ See Securities Exchange Act Release No. 34109 (May 25, 1994), 59 FR 28570 (June 2, 1994) (SR-Phlx-93-29).

¹² See Securities Exchange Act Release No. 41588 (July 1, 1999), 64 FR 37185 (July 9, 1999) (SR-Phlx-98-56).

¹³ The instant proposal would afford the customer absolute priority over all controlled accounts by requiring controlled accounts (that would otherwise have priority or be on parity) to yield to customer accounts. See *infra* Section A.(iii). Telephone conversation between Richard S. Rudolph, Director and Counsel, Phlx, and Ira L. Brandriss, Division, Commission, on December 30, 2002 ("Telephone conversation with Phlx").

¹⁴ See, e.g., Securities Exchange Act Release No. 41588 (July 1, 1999), 64 FR 37185 (July 9, 1999) (SR-Phlx-98-56).

proposed to be corrected. Specifically, the Exchange proposes to state in Phlx rule 1014(g)(ii) that where there is one controlled account on parity, the specialist is entitled¹⁵ to receive 60% of the Remainder of the Order after customer orders that are on parity at the Exchange's best bid/offer, in accordance with rule 1014(g)(i).

In Phlx rule 1014(g)(ii)(C), which cross-references another Enhanced Specialist Participation program (discussed in the next sentence), the Exchange proposes to state that new specialist units trading new options classes shall *be entitled to* receive an Enhanced Specialist Participation. Lastly, in the New Product Enhanced Specialist Participation provisions of Phlx rule 1014(g)(iv), the proposal would require that entire provision to state that when a specialist unit develops and trades a new product, such specialist *is entitled to* receive an Enhanced Specialist Participation in that option such that, when the specialist is on parity with three or more controlled accounts in the crowd, the specialist *is entitled to* receive 40% of the contracts and the controlled accounts *are entitled to* receive the remaining 60%; when the specialist is on parity with less than three controlled accounts in the crowd, the specialist *is entitled to* receive 60% of the contracts and the controlled accounts *are entitled to* receive the remaining 40%.¹⁶ The Exchange represents that all of these provisions were originally intended to be written in the permissive form, as evidenced by other types of Enhanced Specialist Participation programs.¹⁷

¹⁵ The current rule text uses the phrase, "the specialist is entitled to" when referring to the 30% Enhanced Specialist Participation when three or more controlled accounts are on parity, and to the 40% Enhanced Specialist Participation when two controlled accounts are on parity. The Exchange represents that originally in the rule text submitted as File No. SR-Phlx-97-48, the portion of the text concerning the case where one controlled account is on parity also used the phrase, "the specialist is entitled to 60%"; and in SR-Phlx-98-56, the text of the rule was inadvertently changed to "receives 60%." Cf. Securities Exchange Act Release Nos. 39401 (December 4, 1997), 62 FR 65300 (December 11, 1997) (SR-Phlx-97-48); and 41588 (July 1, 1999), 64 FR 37185 (July 9, 1999) (SR-Phlx-98-56). Telephone conversation with Phlx.

¹⁶ See Securities Exchange Act Release No. 41588 (July 1, 1999), 64 FR 37185 (July 9, 1999) (SR-Phlx-98-56).

¹⁷ The Exchange states that even Enhanced Specialist Participation programs proposed after the new product enhanced specialist participation used the language "is entitled to." See Securities Exchange Act Release No. 43100 (July 31, 2000), 65 FR 48778 (August 9, 2000) (SR-Phlx-2001-01) at Exhibit A, proposing to adopt a 50% Enhanced Specialist Participation and an 80% Enhanced Specialist Participation.

Thus, Phlx states, the "entitlement" is not mandatory.

Second, the Exchange proposes to add a reference to the Enhanced Specialist Participation programs and an explanation of how the Enhanced Specialist Participation is calculated. Specifically, the Exchange proposes to expressly state in Phlx rule 1014(g)(i) that several programs provide an Enhanced Specialist Participation to specialists. These programs include a 30% (or, in certain situations, 40% or 60%) Enhanced Specialist Participation, New Unit/New Option Enhanced Specialist Participation,¹⁸ and New Product Enhanced Specialist Participation.¹⁹ The purpose of expressly listing these programs in Phlx rule 1014(g)(i) is to provide an introduction for ease of reference.

The Exchange also proposes to better define how the Enhanced Specialist Participation would be calculated by stating that the Enhanced Specialist Participation is a percentage of the Remainder of the Order to which the specialist is entitled, depending upon whether Phlx rule 1014 (g)(ii), (iii), or (iv) applies. "Remainder of the Order" is proposed to be defined in order to be clear as to which portion of an "Initiating Order" (which is also proposed to be defined) the proposed trade allocation rules would apply.

(iii) *Customer Priority*. Under the current structure of Phlx rule 1014(g), in applying the Enhanced Specialist Participation, when an incoming order arrives on the floor and only the specialist and controlled accounts are on parity, the specialist is entitled to the specified percentage of the order before the controlled accounts divide the rest. However, when a customer order also is being represented in the crowd at the same bid or offer as the specialist and controlled accounts, other rules currently must be taken into account. Specifically, Phlx rule 1014(g)(i) currently provides that orders of controlled accounts must yield priority to customer orders, but that specialists and ROTs closing in person are currently not required to yield priority to customer orders. Thus, currently, a

¹⁸ See Securities Exchange Act Release No. 34109 (May 25, 1994), 59 FR 28570 (June 2, 1994) (SR-Phlx-93-29).

¹⁹ Enhanced specialist participation programs, which determine the portion of an options trade available for allocation to the specialist on parity with controlled accounts, including the mechanical operation of all existing enhanced specialist programs, are described more fully in Securities Exchange Act Release No. 43100 (July 31, 2000), 65 FR 48778 (August 9, 2000) (SR-Phlx-00-01). In that proposal, Phlx attempted to codify a similar introductory provision, but that proposed rule change was withdrawn.

specialist and a ROT closing in person are not required to yield to a customer order represented in the trading crowd while other controlled accounts are. Nonetheless, pursuant to the Enhanced Specialist Participation provisions, currently a customer may not receive a smaller participation than any trading crowd participant, including an ROT closing in person.²⁰

The Exchange is proposing to delete the clause in Phlx rule 1014(g)(i) that allows specialists and ROTs closing in-person to be on parity with customer orders, and to make conforming changes to Phlx rules 1014(g)(ii), (iii), and (iv). The instant proposal would thus require the accounts of specialists and ROTs closing in-person to yield priority to all customer accounts. The purpose of this provision is to make the Exchange more attractive to customer orders.²¹

(iv) *Proposed New Rule 1014(g)(v)*. At this time, Phlx proposes to adopt new paragraph (g)(v) to Phlx rule 1014 to codify and detail how trade allocation functions for non-AUTO-X orders²² subject to allocation under Phlx rule 1014(g).²³

In order to explain how options trade allocation functions, it is necessary first to define and discuss the concepts of "stated size" and "Defined Participation."

a. *Stated Size*. Currently, in situations in which the specialist handles AUTOM-delivered²⁴ orders manually, the individual crowd participants do not in all cases quote a specific size prior to the execution of such an order, but rather the entire crowd is responsible for the disseminated price up to the disseminated size. The proposed rule change would, with one exception²⁵ require, on a trade-by-trade

²⁰ See Phlx rule 1014(g)(ii).

²¹ See Amendment No. 5.

²² For a discussion of situations in which incoming orders would not be eligible for automatic execution via AUTO-X, see Securities Exchange Act Release No. 45927 (May 15, 2002), 67 FR 36289 (May 23, 2002) (SR-Phlx-2001-24).

²³ See *supra* note 7.

²⁴ AUTOM is the Exchange's electronic order delivery and reporting system, which provides for the automatic entry and routing of equity option and index option orders to the Exchange trading floor. Orders delivered through AUTOM may be executed manually, or certain orders are eligible for AUTOM's automatic execution feature, AUTO-X. Equity option and index option specialists are required by the Exchange to participate in AUTOM and its features and enhancements. Option orders entered by Exchange members into AUTOM are routed to the appropriate specialist unit on the Exchange trading floor.

²⁵ Proposed Phlx rule 1014(g)(v)(C)(3) would entitle the specialist to receive the Enhanced Specialist Participation for contracts executed in excess of the Exchange's disseminated size if the specialist does not state a size regarding such excess

basis, each crowd participant to state a size for which they are firm at any time prior to an execution.

In the context of this proposed rule change, "stated size" means, in the case of orders handled manually by the specialist (for example, in the case of an order that is delivered via AUTOM but is not eligible for execution via AUTO-X²⁶) if a crowd participant (including the specialist) has actually stated a size ("Actual Size"), such crowd participant's stated size shall be his or her Actual Size.

Unless the specialist has an Actual Size, the stated size of the specialist shall be the amount (if any) by which the disseminated size²⁷ exceeds the sum of (x) the aggregate size of limit orders included in the disseminated size and (y) the aggregate sizes of the quotations at the disseminated price of all ROTs who have Actual Sizes.

The proposal further would provide that the stated size of an ROT who does not have an Actual Size is zero. Therefore, in the case of an order handled manually by the specialist and that is subject to allocation under Phlx rule 1014(g), if an ROT does not actually state the size for which he or she is firm at the disseminated price, such ROT would not be entitled to receive any contracts in such an order.

The proposed rule would also provide that, in the case of floor-brokered orders, each crowd participant's stated size shall be his or her Actual Size. Thus, when a floor broker enters a crowd and asks for a market, the specialist and ROTs would be required to state, along with the price for which they are firm, an Actual Size for which they are firm in order to be entitled to be allocated contracts resulting from the execution of the order. Again, in the case of orders represented in the crowd by a floor broker, if a crowd participant does not have an Actual Size, such crowd participant would not be entitled to receive any contracts.

contracts. If the specialist states a size prior to the execution of such excess contracts, the specialist's entitlement would be limited by that size. See subparagraph b. below.

²⁶ Phlx represents that other examples of orders handled manually by the specialist include orders delivered by the Floor Broker Order Entry system and orders placed manually on the limit order book.

²⁷ Currently, Phlx rule 1082(a)(ii) defines "disseminated size" as, respecting options subject to new technology (the "new Auto-Quote") and options subject to a proprietary quoting system provided for in Phlx rule 1080.02 ("Specialized Quote Feed"), at least the sum of limit orders at the Exchange's disseminated price. The specialist and crowd may determine to disseminate a size greater than the sum of limit orders. For instance, the disseminated size may include additional size disseminated by the specialist, one or more ROTs, or the total crowd size.

Once the stated size of the specialist and ROTs has been established under proposed Phlx rule 1014(g)(v)(B), the allocation of contracts would take place in accordance proposed sub-paragraph (g)(v)(C), "Defined Participation."

b. *Defined Participation.* Under the proposal, "Defined Participation" would mean the portion of the Remainder of the Order to which a crowd participant is entitled.

In the case of a specialist entitled to an Enhanced Specialist Participation, the Defined Participation would mean the Enhanced Specialist Participation, up to the specialist's stated size. This means that if the specialist's stated size is for a number of contracts that is less than the size of the Enhanced Specialist Participation, the specialist would be entitled to receive a number of contracts that is limited to the specialist's stated size, and not the full Enhanced Specialist Participation *unless* the situation described in Phlx rule 1014(g)(v)(C)(3) applies.²⁸

The Defined Participation for other crowd participants on parity would mean, where all participants have equal stated sizes, an equal share of the Remainder of the Order to be allocated after the specialist receives the Enhanced Specialist Participation, if applicable. Where participants have unequal stated sizes, the Defined Participations would equal their "Base Participations," defined as the stated size of the smallest participant (provided that, if the sum of all Base Participations would exceed the number of contracts in the Remainder of the Order, then the Remainder of the Order would be divided equally among crowd participants on parity, subject to rounding) plus their "Supplemental Participations." After the allocation of the Base Participation, the smallest participant would not be entitled to receive a Supplemental Participation, since that participant would have been allocated contracts equaling such participant's stated size. The other crowd participants who are on parity and who would be entitled to receive additional contracts would be entitled to receive Supplemental Participations.

Supplemental Participations would be equal to the remaining stated size, after the allocation of the Base Participation, of the smallest remaining participant entitled to receive such a Supplemental Participation (provided that, if the sum of all initial Supplemental Participations would exceed the number of contracts remaining to be allocated, then such contracts would be divided equally among crowd participants on

parity, subject to rounding). If the remaining stated sizes of all participants entitled to receive initial Supplemental Participations is equal, then their initial Supplemental Participations would be equal. The allocation of the Supplemental Participations would continue in this manner until the number of contracts to be allocated is exhausted.

The proposed rule would provide that the specialist may decline to receive the Enhanced Specialist Participation, in which case the specialist would be entitled to participate as one crowd participant, up to (*i.e.*, limited by) the specialist's stated size. The Exchange believes that this limitation should provide incentives for specialists to bid for and offer options contracts reflecting their true size, resulting in greater transparency in the Exchange's markets.

When a market or marketable limit order is received with a size greater than the Exchange's disseminated size, some crowd participants may be willing to execute a larger size than the disseminated size.²⁹ Where the Remainder of the Order is greater than the portion of the disseminated size that is attributable to the specialists and ROTs,³⁰ the proposed rule change would provide that participation in additional contracts in excess of such size among willing crowd participants shall be allocated under the otherwise applicable provisions of Phlx rule 1014.³¹

Specifically, once the disseminated size is executed and allocated among crowd participants on parity, any crowd participants who wish to execute additional contracts in excess of the disseminated size may participate in a

²⁹ Phlx rule 1082(e), Firm Quotations, provides that, if responsible brokers or dealers receive an order to buy or sell a listed option at the disseminated price in an amount greater than the disseminated size (for customer orders) or the quotation size (for broker-dealer orders), such responsible broker or dealer shall, within thirty (30) seconds of receipt of the order, (i) execute the entire order at the disseminated price (or better), or (ii) execute that portion of the order equal to the disseminated size (in the case of a customer order) or the quotation size (in the case of a broker-dealer order) at the disseminated price (or better), and revise its bid or offer. The Exchange filed with the Commission on October 4, 2002, a proposed rule change to codify the situation in which responsible brokers or dealers elect to execute a number of contracts greater than the disseminated size but not necessarily the size of the entire order. See File No. SR-Phlx-2002-60.

³⁰ Phlx defines disseminated size as, with respect to the disseminated price for any quoted options series, at least the sum of limit orders; however, the proposal would permit the specialist and crowd to disseminate a size greater than the sum of the limit orders. See Securities Exchange Act Release No. 46325, (August 8, 2002), 67 FR 53376 (August 15, 2002) (approving File No. SR-Phlx-2002-15).

³¹ Telephone conversation with Phlx.

²⁸ See discussion, *infra* page 16.

“second round” of bidding for or offering additional contracts in excess of the disseminated size (the “excess contracts”). This subset of willing crowd participants would be entitled to participate under the same rules applicable to the Remainder of the Order. Once all crowd participants have been satisfied in the original allocation up to the disseminated size, the “second round” would constitute a new parity situation respecting the willing crowd participants in the excess contracts. The excess contracts would be allocated among those crowd participants who wish to participate in additional contracts, in accordance with the proposed rule. Therefore, if the specialist is a willing participant in the excess contracts, the specialist would be entitled to receive an Enhanced Specialist Participation in such excess contracts.

Proposed Phlx rule 1014(g)(v)(C)(3) is intended to address this situation where an order is received via AUTOM and handled manually by the specialist for a number of contracts greater than the Exchange’s disseminated size, and the specialist executes the entire order manually prior to stating a size. The proposed rule would provide that, if the specialist has no Actual Size, the specialist would nonetheless be entitled to receive the Enhanced Specialist Participation for all contracts executed in excess of the disseminated size. The proposed rule limits the specialist’s entitlement if the specialist has an Actual Size. In such a situation, the specialist would be entitled to receive the Enhanced Specialist Participation, but not to exceed the specialist’s Actual Size in such excess contracts.

c. *Waiver*. The proposal is not intended to require, without exception, that crowd participants be allocated the number of contracts to which they would be entitled.³² The proposal would allow crowd participants, in their sole discretion, to offer to waive, in whole or in part, any part of a trade to which they were entitled to be allocated (an “Offer to Waive”), by stating so in a loud and audible voice to the other members of the trading crowd and the Allocating Participant.³³ In structuring the waiver provisions, the Exchange represents that it has incorporated basic

contract principles,³⁴ including communication of an offer, acceptance, and revocation.³⁵

For example, a crowd participant may make an Offer to Waive in situations in which hedging transactions become difficult or cumbersome due to lack of availability or liquidity in the underlying stock; additionally, a crowd participant may make an Offer to Waive to accommodate the execution of a particularly large sized order on the Exchange by larger crowd participants, or to accommodate a crowd participant closing out a position. At the same time, the proposed rule change would provide that a pattern or practice of waiving all or a portion of a crowd participant’s entitlement may be considered conduct inconsistent with just and equitable principles of trade.³⁶

If the Allocating Participant determines that the other crowd participant(s) then on parity is (are) willing to take the number of contracts that are subject to the Offer to Waive, the Allocating Participant may (but would not be required to), accept such Offer to Waive by (i) allocating the Remainder of the Order, taking into account the Offer to Waive, in accordance with proposed Phlx rule 1014(g)(v), or (ii) otherwise indicating, following the execution of the Initiating Order, that such Offer to Waive will be accepted.

The proposed rule addresses both a Total Waiver, in which a crowd participant effects a Waiver of his or her entire entitlement, and a Partial Waiver, in which a crowd participant effects a Waiver of a portion of his or her respective entitlement but not a Total Waiver. If a crowd participant effects a Total Waiver or a Partial Waiver, the number of contracts to which such participant would otherwise be entitled

would be reduced by the number of contracts waived. The entitlements of the other participants on parity (and who have not effected a Total or Partial Waiver) would be determined by redistributing the waived number of contracts to willing participants (including the specialist) based on the Defined Participation.³⁷

d. *Waiver and the Enhanced Specialist Participation*. The proposed rule would provide that, in the case of an option which is subject to an Enhanced Specialist Participation, and one or more ROTs effect Total Waivers leaving the specialist on parity (after giving effect to such Total Waivers) with three or more ROTs, the Enhanced Specialist Participation to which the specialist would be entitled is as if the specialist had been on parity with three ROTs; similarly, if one or more ROTs effect Total Waivers leaving the specialist on parity (after giving effect to such Total Waivers) with two or more ROTs, the Enhanced Specialist Participation to which the specialist would be entitled is as if the specialist had been on parity with two ROTs, and if one or more ROTs effect Total Waivers leaving the specialist on parity (after giving effect to such Total Waivers) with one ROT, the Enhanced Specialist Participation to which the specialist would be entitled is as if the specialist had been on parity with one ROT. In no event, however, would a specialist that is on parity with one ROT be entitled to receive a number of contracts that is greater than the Enhanced Specialist Participation, unless the one ROT has waived his entitlement or has been satisfied.

The proposed rule would make clear that, in no event would any non-waiving ROT be required to participate in fewer contracts than he/she would have received absent the Waiver(s). The purpose of this provision is to ensure that the ROT that remains on parity with the specialist does not receive fewer contracts than such ROT would have received if not for the Waivers.

e. *Partial Waiver*. The proposed rule would provide that, respecting options subject to the Enhanced Specialist Participation, in the event that one or more ROTs on parity with the specialist effect a Partial Waiver, the specialist would not be entitled to receive a number of contracts that is greater than 40% of the Remainder of the Order or, in the case of the specialist being on

³⁴ See Corbin, Contracts section 1515 and 13 Pa. C.S.A. section 1102 (corresponding to section 1–102 of the Uniform Commercial Code) regarding variation by agreement, stating the basic principles of commercial and contract law that parties may generally waive rights or benefits to which they would otherwise be entitled. In order to ensure that no waiver is coerced, the Exchange is proposing to codify that it would be inconsistent with “just and equitable principles of trade” for a participant to harass, coerce or intimidate another participant to waive any rights.

³⁵ The Exchange notes that waiver also appears in disciplinary and membership rules, as well as in the Act. Under the disciplinary processes of the exchanges, there is a right to a hearing, which can be waived. See, e.g., Amex rule 590(f) and Chicago Stock Exchange Article XII, rule 9. See also CBOE rule 3.9(b) permitting clearing firms to waive the membership posting period. The proposed provisions do not implicate the anti-waiver provisions of section 29(a) of the Act, 15 U.S.C. 78cc(a), which aims to prevent the waiver of the application of U.S. securities laws in certain situations where fraud is involved.

³⁶ See proposed rule 1014(g)(v)(F)(2).

³⁷ The proposal does not contemplate, and would not allow, a crowd participant to waive his/her entitlement to receive a given number of contracts to designate that the contracts subject to the Waiver be allocated to any other specific crowd participant or participants.

³² Telephone conversation with Phlx.

³³ Options Floor Procedure Advice (“Advice”) F–2 currently provides that, generally, the largest participant allocates the trade. The Exchange has proposed to modify Phlx rule 1014(g) and Advice F–2 governing who allocates trades. See Securities Exchange Act Release No. 47500 (March 13, 2003) (notice of File No. SR–Phlx–2001–28).

parity with only one ROT, 60%, unless all other ROTs on parity have waived their entitlements or have received a number of contracts equal to their remaining size after the Partial Waiver(s). The proposal would provide, however, for the reasons stated above, that in no event shall a ROT be required to participate in fewer contracts than he/she would have received absent the Partial Waiver(s).

f. *Other Provisions.* The proposal would provide that, in situations where the allocation of contracts result in fractional amounts of contracts to be allocated to crowd participants, the number of contracts to be allocated would be rounded in a fair and equitable manner.

The proposal would also provide that it shall be considered conduct inconsistent with just and equitable principles of trade for a member: (a) To allocate initiating orders other than in accordance with Phlx rule 1014; (b) to enter into any agreement with another member concerning allocation of trades; or (c) to harass, intimidate or coerce any member to enter into or revoke any Waiver, or to make or refrain from making any complaint or appeal. A pattern or practice of waiving all or a portion of a crowd participant's entitlement, with the result that such crowd participant receives no allocation or a lesser allocation than he or she would otherwise have been entitled to, may be considered conduct inconsistent with just and equitable principles of trade. The Exchange notes that although it is proposing to expressly reference "just and equitable principles of trade"³⁸ in this proposed rule,³⁹ it does not intend to create an inference, with respect to other Exchange rules that do not contain such an express reference, that violations of such rules could not in appropriate instances also violate just and equitable principles of trade. The Exchange may, in the case of other Exchange rules where there is no express reference to "just and equitable principles of trade," nonetheless determine that a violation of such other rules also constitutes conduct inconsistent with just and equitable principles of trade.⁴⁰ The Exchange

believes that this provision of the proposed rule is consistent with the requirement in the Order to promptly stop any practice or procedure relating to the allocation of orders if neither it nor a related practice or procedure that would supercede the existing practice or procedure has been submitted for approval or is not already authorized by rule.

Finally, the proposal would provide that, notwithstanding the first sentence of Phlx rule 1014(g)(i), neither Phlx rule 119(b) and (c) concerning precedence based on the size of bids at parity, nor Phlx rule 120 (insofar as it incorporates those provisions by reference) shall apply to the allocation of orders covered by this Phlx rule 1014(g)(v).

2. Statutory Basis

The Exchange believes that the proposed rule change would codify existing practices concerning options trade allocation where ROTs and specialists are on parity, and would provide a fair process for trade allocation among floor traders (specialists and ROTs). It would provide for the waiver of minimum trade allocation entitlements where appropriate while establishing a process that would help ensure fair and equitable trade allocation in such case.⁴¹ This process would include, for instance, the requirement that Offers to Waive be vocalized and accepted. Further, the Exchange believes that trade allocation is, in part, a process in the functioning of an auction market. In its role as a facility for options trading, the Exchange believes that the approach proposed herein is appropriate and consistent with the Act.⁴² The Exchange believes that the approach represents a codification of practices that have developed as the options markets have evolved and changed.

In addition to being necessary and appropriate, the Exchange believes that its approach has certain benefits and results that would foster and achieve the objectives of section 6(b)(5) of the Act.⁴³ Specifically, proposed Phlx rule 1014(g)(v) expressly would provide a

a violation of Phlx rule 1014(g)(v), for instance, can be in and of itself a stand-alone violation.

⁴¹ Telephone conversation with Phlx.

⁴² The Exchange notes that the Commission has previously acknowledged that granting benefits like the Enhanced Specialist Participation is within the business judgment of the Exchange, as long as such advantages do not restrain competition and do not harm investors. See Securities Exchange Act Release No. 42700 (April 18, 2000), 65 FR 24246 (April 25, 2000) (SR-Phlx-99-39); see also Securities Exchange Act Release No. 43100 (July 31, 2000), 65 FR 48778 (August 9, 2000) (publishing for notice and comment File No. SR-Phlx-00-01).

⁴³ 15 U.S.C. 78f(b)(5).

fair and equitable mechanism to allocate trades among floor traders on parity.⁴⁴ Such a mechanism is necessary to the functioning of a trading crowd in an auction market and, thus, to the maintenance of deep, liquid and orderly options markets.

The Exchange states that its ability to attract order flow hinges to a great extent on its ability to execute a large number of trades of various sizes, including very large trades, efficiently and expeditiously. The Exchange states that trading crowds facilitate those executions far better than could individual market makers, because a trading crowd usually represents much more liquidity than an individual market maker. The proposed rule would codify certain trade allocation entitlements, and the ability of crowd participants to waive such entitlements where appropriate, but not to the extent that such waiver becomes a pattern or practice. This, in turn, would maximize smooth functioning of trading crowds and efficient executions.⁴⁵

Phlx believes that the proposed rule should promote fair and orderly markets by: (1) Establishing clear trade allocation rules; and (2) specifying when and how floor traders may decline to receive any part of a trade to which they otherwise would have been entitled.

For these reasons, the Exchange believes that its proposal is consistent with section 6(b) of the Act,⁴⁶ in general, and section 6(b)(5) of the Act,⁴⁷ in particular, in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and protect investors and the public interest by codifying a trade allocation approach that best facilitates fair and orderly markets.

⁴⁴ The Exchange believes that self-regulatory organizations ("SROs") should be afforded the broadest latitude to adopt trading rules that its governing bodies determine are most appropriate to the needs of the marketplace and its competitive position, and notes that, in its recent proposal to promulgate new rule 19b-6 under the Act, SROs would be permitted to file "trading rules" as effective upon filing, without staff review or Commission order, unless such a trading rule would "make fundamental structural changes to the market." For purposes of the proposed rule, the term "trading rule" includes rules governing member trading * * * such as rules governing * * * priority of orders, bids and offers. See proposed rule 19b-6(b)(6) and (g)(1) at Securities Exchange Act Release No. 43860 (January 19, 2001), 65 FR 8912 (February 5, 2001). The Commission notes that it has not taken final action on proposed rule 19b-6.

⁴⁵ Telephone conversation with Phlx.

⁴⁶ 15 U.S.C. 78f(b).

⁴⁷ 15 U.S.C. 78f(b)(5).

³⁸ See Phlx rule 707.

³⁹ Other Exchange rules expressly reference just and equitable principles of trade. See, e.g., Phlx rules 1015(b), 1042.02 and 1051(a).

⁴⁰ The lack of express reference in other Phlx rules should not be construed as waiving the ability to make a violation of Phlx rule 707 co-exist with any other violation, depending on the facts and circumstances of the case. The Exchange believes that a violation of the existing parity/priority provisions of its rules could be a violation of just and equitable principles of trade and could be subject to disciplinary action as such. In addition,

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.

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.

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 such proposed rule change, as amended; 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, as amended, 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 will also be available for inspection and copying at the principal offices of the Exchange. All submissions should refer to File No. SR-Phlx-2001-39 and should be submitted by April 15, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁴⁸

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03-6990 Filed 3-24-03; 8:45 am]

BILLING CODE 8010-01-P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new and/or currently approved information collection.

DATES: Submit comments on or before May 27, 2003.

ADDRESSES: Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collection, to Carol Fendler, Director, Office of Licensing and Program Standards, Small Business Administration, 409 3rd Street SW., Suite 6300, Washington, DC 20416

FOR FURTHER INFORMATION CONTACT: Carol Fendler, Director, 202-205-7559 or Curtis B. Rich, Management Analyst, 202-205-7030.

SUPPLEMENTARY INFORMATION:

Title: Licenses Application.

Form No's: 2181, 2182 & 2183.

Description of Respondents: Small Business Investment Companies.

Annual Responses: 210.

Annual Burden: 12,000.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. 03-6962 Filed 3-24-03; 8:45 am]

BILLING CODE 8025-01-P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending March 14, 2003

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. 412 and 414. Answers may be filed within 21 days after the filing of the application.

Docket Number: OST-2003-14685.

Date Filed: March 11, 2003.

Parties: Members of the International Air Transport Association.

Subject:

PTC2 EUR 0497 dated March 11, 2003.

Mail Vote 273—TC2 Europe. Resolution 010S—TC2 Within Europe Special Passenger Amending Resolution.

Intended effective date: March 22, 2003.

Docket Number: OST-2003-14703.

Date Filed: March 13, 2003.

Parties: Members of the International Air Transport Association.

Subject:

PTC2 EUR 0499 dated March 14, 2003.

Mail Vote 282—Resolution 010v. TC2 Within Europe Special Passenger Amending Resolution from France to Europe. Intended effective date: March 28, 2003.

Dorothy Y. Beard,

Chief, Docket Operations & Media Management, Federal Register Liaison.

[FR Doc. 03-7082 Filed 3-24-03; 8:45 am]

BILLING CODE 4910-62-P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending March 14, 2003

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under subpart B (formerly subpart Q) of the Department of Transportation's Procedural Regulations (*See* 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST-1996-1642.

Date Filed: March 12, 2003.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: April 2, 2003.

Description: Application of Continental Airlines, Inc., pursuant to 49 U.S.C. 41102 and subpart B, requesting renewal of its Route 729

⁴⁸ 17 CFR 200.30-3(a)(12).