

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

The foregoing proposed rule change has been designated as a fee change pursuant to Section 19(b)(3)(A)(ii) of the Act¹⁰ and Rule 19b-4(f)(2)¹¹ thereunder. Accordingly, the proposal has taken effect upon filing with the Commission. At any time within 60 days after the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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. Comments may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-Phlx-2004-05. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hard copy or by e-mail, but not by both methods. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR-Phlx-2004-05 and should be submitted by March 2, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49173; File No. SR-Phlx-2004-07]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to the Extension of Its Pilot Program To Implement Its Existing Fee Schedule for Electronic Communications Networks

February 2, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 28, 2004, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to extend the Exchange's current pilot program for an additional one-year period (until January 31, 2005), in order to continue to impose a \$2,500 monthly fee for Electronic Communications Networks ("ECNs") that are member organizations and send order flow to the Exchange's equity trading floor.³ The current pilot

program is scheduled to expire on January 31, 2004.⁴ The \$2,500 fee would continue to apply to ECN trades where the ECN is not acting as a specialist or a floor broker, but rather an order flow provider. This fee is in lieu of the equity transaction value charge that would normally apply to (non-specialist) equity trades.

The text of the proposed rule change is available at the Office of the Secretary, the Phlx, and the Commission.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The purpose of the proposed rule change is to extend the Exchange's current ECN pilot program that imposes a \$2,500 monthly fee for ECNs that are member organizations and send order flow to the Exchange's equity trading floor for an additional one-year period, until January 31, 2005. The continuation of the \$2,500 fee is intended to attract equity order flow from ECNs to the Exchange by continuing to substitute a fixed monthly fee, in light of the potential for high volumes of order flow from ECNs.⁵

than riskless principal. See SEC Rule 11Ac1-1(a)(8). The Exchange is herein proposing minor changes to this definition, which appears on the fee schedule, to correct inconsistencies between the text of the SEC Rule 11Ac1-1(a)(8) and the text that appears on the Exchange's fee schedule.

⁴ See Securities Exchange Act Release No. 47120 (January 3, 2003), 68 FR 1498 (January 10, 2003) (Notice of Filing and Immediate Effectiveness of SR-Phlx-2002-83, extending the ECN fee pilot program until January 31, 2004). See also Securities Exchange Act Release Nos. 44155 (April 5, 2001), 66 FR 19274 (April 13, 2001) (Notice of Filing and Immediate Effectiveness of SR-Phlx-2001-09, adopting the ECN fee program on a pilot basis); and 45456 (February 19, 2002), 67 FR 8831 (February 26, 2002) (Notice of Filing and Immediate Effectiveness of SR-Phlx-2002-08, extending the ECN fee pilot program until January 31, 2003).

⁵ To recoup costs due from the Exchange to the Commission pursuant to Section 31(b) of the Act,

¹⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

¹¹ 17 CFR 240.19b-4(f)(2).

¹² 17 CFR 200.30-3(a)(12).

¹⁵ U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ As stated on the Phlx fee schedule, ECNs shall mean any electronic system that widely disseminates to third parties orders entered therein by an Exchange market maker or over-the-counter ("OTC") market maker, and permits such orders to be executed against in whole or in part; except that the term ECN shall not include: any system that crosses multiple orders at one or more specified times at a single price set by the ECN (by algorithm or by any derivative pricing mechanism) and does not allow orders to be crossed or executed against directly by participants outside of such times; or, any system operated by, or on behalf of, an OTC market-maker or exchange market-maker that executes customer orders primarily against the account of such market maker as principal, other

The monthly fee will continue to apply to ECN order flow to the Exchange's equity trading floor, including from ECNs that either became members or began sending order flow after the commencement of the initial program. The \$2,500 fee would continue to apply to ECNs that are not acting as a Phlx specialist or floor broker.⁶

Currently, no ECN operates from the Exchange's equity trading floor as a floor broker or specialist unit. If, however, an ECN did operate from the equity trading floor, it could be subject to various floor-related fees respecting its floor operation.⁷ In addition, an ECN's transactions as a floor broker would be subject to the equity transaction charge and its specialists would be subject to other charges.⁸ Even if the ECN was acting as a floor broker or specialist with respect to some trades, those trades for which it was not acting as a floor broker or specialist, but rather an ECN, would be subject only to the flat monthly fee and not other transaction charges. An ECN that only operates as a specialist or floor broker would not have to pay the monthly fee, because it would, instead, be paying the normal transaction charges applicable to floor brokers and specialists.

An ECN would also continue to be subject to, if applicable, the following membership-related fees: Foreign Currency User Fees, Application Fee, Initiation Fee, Transfer Fee for Foreign Currency Options Participations, Phlx CCH Guide Fee, Examinations Fee, Review/Process Subordinated Loans Fee, Registered Representative Registration fees, Trading Floor Personnel Registration Fee, Off-Floor

the Exchange intends to continue to apply such fee to ECNs, as the current fee schedule reflects.

⁶ An ECN would also continue to incur certain license fees and other fees as specified on the Exchange's schedule of dues, fees and charges. In addition, an ECN would continue to incur specialist or equity floor brokerage transaction fees if it acts as a Phlx specialist or floor broker.

⁷ According to the Exchange, these include the Trading Post/Booth Fee, Trading Post w/Kiosk Fee, Kiosk Construction Fee (when requested by specialist), Controller Space Fee, Floor Facility Fee, Shelf Space on Equity Option Trading Floor Fee, Computer Equipment Services, Repairs or Replacements Fee and Computer Relocation Requests Fee. Certain communications fees could also apply, such as the Direct Wire to the Floor Fee, Telephone System Line Extensions, Wireless Telephone System, Tether Initial Connectivity Fee, Tether Monthly Service Fee, Execution Services/Communication Charge, Stock Execution Machine Registration Fee (Equity Floor), Equity, Option, or FCO Transmission Charge, FCO Pricing Tape, Option Report Service Fee, Quotron Equipment Fee, Instinet, Reuters Equipment Pass-Through Fee and the Option Mailgram Service Fee.

⁸ For example, certain license fees may apply to specialists, and the Equity Floor Brokerage Assessment and Equity Floor Brokerage Transaction Fee apply to floor brokerage activity.

Trader Initial Registration Fee and Annual Fee, and Remote Specialist fees.⁹

Because the \$2,500 fee is a flat monthly fee as opposed to a per-transaction fee, it is intended to encourage ECN volume. Currently, the equity transaction charge (that would otherwise apply to an ECN's equity trades) ranges, based on share volumes, with a \$50 maximum fee per trade side, and various other applicable discounts. Thus, many variables determine whether the proposed monthly \$2,500 fee is generally more favorable than the equity transaction charge, depending upon the number of trades, size of the trade and type (*i.e.*, PACE). As a general matter, the Exchange believes that \$2,500 would be more favorable to the ECN because it is a fixed amount.

The Exchange believes that the monthly ECN fee provides competitive fees with appropriate incentives, thus providing a reasonable method to attract large order flow providers such as ECNs to the Exchange. Additional order flow should enhance liquidity, and improve the Exchange's competitive position in equity trading. The Exchange believes that structuring this fee for ECNs is appropriate, as ECNs are unique in their role as order flow providers to the Exchange. Specifically, ECNs operate a unique electronic agency business, similar to a securities exchange, as opposed to directly executing orders for their own customers as principal or agent.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹⁰ in general, and furthers the objectives of Section 6(b)(4)

⁹ In a separate proposed rule change, the Exchange states that it amended its schedule of dues, fees, and charges to adopt permit fees in connection with the Exchange's recent demutualization and to make other related post-demutualization fee changes. Pursuant to that proposal, permit fees were adopted and certain fees were deleted from the Exchange's fee schedule. For example, fees that were deleted included membership dues, charges relating to Equity Trading Permits, Foreign Currency Options Participation fee, Technology Fee for Exchange members and for Foreign Currency Options Participants who do not hold legal title to a Phlx membership. References to the capital funding fee and monthly credit were also deleted and the Foreign Currency User Fee was increased. See Securities Exchange Act Release No. 49157 (January 30, 2004) (Notice of Filing and Immediate Effectiveness of SR-Phlx-2004-02). This proposal became effective for new members and participants upon the issuance of permits when the Exchange's demutualization became effective (January 20, 2004). Pre-demutualization membership-related fees will remain in effect for then current members, participants, and member and participant organizations for the month of January 2004.

¹⁰ 15 U.S.C. 78f(b).

of the Act,¹¹ in particular, by providing for the equitable allocation of reasonable dues, fees and other charges among its members due to the unique character of ECNs, and because the fixed monthly fee is a reasonable method of attracting a new form of order flow to the Exchange.

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

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

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

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

The foregoing rule change establishes or changes a due, fee, or charge imposed by the Exchange and, therefore, has become effective upon filing pursuant to Section 19(b)(3)(A)(ii) of the Act¹² and Rule 19b-4(f)(2) thereunder.¹³ At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purpose of the Act.

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. Comments should be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-Phlx-2004-07. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hard copy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements

¹¹ 15 U.S.C. 78f(b)(4).

¹² 15 U.S.C. 78(s)(b)(3)(A)(ii).

¹³ 17 CFR 240.19b-4(f)(2).

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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-Phlx-2004-07 and should be submitted by March 2, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49178; File No. SR-Phlx-2004-10]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating To a Pilot Program To Deploy the Options Floor Broker Management System

February 3, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4² thereunder, notice is hereby given that on February 2, 2004, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to approval the proposal, on an accelerated basis.

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

The Exchange proposes to extend its pilot program pertaining to the Options Floor Broker Management System (the "System") from February 6, 2004 until

August 2, 2004.³ The System is a new component of the Exchange's Automated Options Market (AUTOM) and Automatic Execution (AUTO-X) System.⁴

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

In its filing with the Commission, the Phlx included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The purpose of the proposed rule change is to extend the effectiveness of the rules governing the System through

³ On July 31, 2003, the Exchange filed a proposed rule change to implement a pilot program to deploy the Exchange's new System. The proposed rule change was noticed, and accelerated approval was granted thereto, on July 31, 2003. The pilot was scheduled to expire on August 29, 2003. See Securities Exchange Act Release No. 48266 (July 31, 2003), 68 FR 152 (August 7, 2003) (SR-Phlx-2003-56). On August 29, the Commission extended the pilot to September 12, 2003. See Securities Exchange Act Release No. 48425 (August 29, 2003), 68 FR 53210 (September 9, 2003) (SR-Phlx-2003-60). On September 12, 2003, the Commission extended the pilot again until November 14, 2003. See Securities Exchange Act Release No. 48490 (September 12, 2003), 68 FR 54926 (September 19, 2003). On December 18, 2003, the Commission extended the pilot until February 6, 2004. See Securities Exchange Act Release No. 48947 (December 18, 2003), 68 FR 75012 (December 29, 2003). In order to avoid a lapse in the effectiveness of this pilot, the Commission now is approving the Exchange's proposal to extend the rule from February 6, 2004 until August 2, 2004. The Exchange has also filed for permanent approval of the proposed rules. See Securities Exchange Act Release No. 48265 (July 31, 2003), 68 FR 47137 (August 7, 2003) (SR-Phlx-2003-40). The Exchange acknowledges that SR-Phlx-2003-40 and Amendment No. 1 thereto are subject to public comment, which may result in amendments to the proposed rules.

⁴ AUTOM is the Exchange's electronic order delivery, routing, execution 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. See Exchange Rule 1080.

August 2, 2004, in order to continue to have rules in place concerning the System and to ensure that Floor Brokers using the System during the continuing deployment would not be in violation of current Exchange rules regarding ticket marking requirements. The rules had previously been effective through August 29, 2003, extended through September 12, 2003, November 14, 2003, and February 6, 2004.⁵

The System is designed to enable Floor Brokers and/or their employees to enter, route and report transactions stemming from options orders received on the Exchange. Floor Brokers or their employees access the System through an electronic Exchange-provided handheld device on which they would have the ability to enter the required information as set forth in Phlx Rule 1063(e), either from their respective posts on the options trading floor or in the trading crowd. The System will eventually replace the Exchange's current Floor Broker Order Entry System ("FBOE"),⁶ as part of a roll-out of the new System floor-wide.

All of the rules pertaining to the System effective February 6, 2004 are proposed to be extended until August 2, 2004, including: Rules 1014(g), 1015, 1051, 1063, 1064, and 1080.06, as well as Option Floor Procedure Advices ("Advice") A-11, B-6, B-8, C-2, C-3, F-1, F-2, and F-4.

The Exchange believes that the System will enable Floor Brokers to handle orders they represent more efficiently, and will further enable the Exchange to comply with the audit trail requirement for non-electronic orders required under the Order Instituting Public Administrative Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Sanctions.⁷

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act⁸ in general, and

⁵ See note 3, *supra*.

⁶ See Securities Exchange Act Release No. 41524 (June 14, 1999), 64 FR 33127 (June 21, 1999) (SR-Phlx-99-11). The FBOE, a component of AUTOM, currently provides a means for (but does not require) Floor Brokers to route eligible orders to the specialist's post, consistent with the order delivery criteria of the AUTOM System set forth in Exchange Rule 1080(b). The new System would include the same functionality as the FBOE, in addition to providing an electronic audit trail for non-electronic orders received by Floor Brokers by way of the entry of the required information in proposed Rule 1063(e).

⁷ See Securities Exchange Act Release No. 43268 (September 11, 2000) and Administrative Proceeding File 3-10282 (the "Order").

⁸ 15 U.S.C. 78f(b).

¹⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.