

and other charges among its members and other persons using its facilities for the purpose of executing P/A Orders or P Orders that are routed to the Exchange from other market centers.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

No written comments were solicited or received with respect to the proposed rule change.

### III. 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 may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-PCX-2004-03. 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 hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should be submitted by February 26, 2004.

### IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1

After careful consideration, the Commission finds that the proposed

rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder, applicable to a national securities exchange,<sup>7</sup> and, in particular, with the requirements of section 6(b) of the Act<sup>8</sup> and the rules and regulations thereunder. The Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(4) of the Act,<sup>9</sup> which requires that the rules of the Exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Commission believes that the extension of the Exchange's Linkage fee pilot program until July 31, 2004 will give the Exchange and the Commission further opportunity to evaluate whether such fees are appropriate.

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> for approving the proposed rule change, as amended, prior to the thirtieth day after the date of publication of the notice of the filing thereof in the **Federal Register**. The Commission believes that granting accelerated approval of the proposed rule change, as amended, will preserve the Exchange's existing pilot program for Linkage fees without interruption as the PCX and the Commission further consider the appropriateness of Linkage fees.

### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>11</sup> that the proposed rule change (SR-PCX-2004-03), as amended, is hereby approved on an accelerated basis for a pilot period to expire on July 31, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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<sup>7</sup> In approving this rule, the Commission notes that it has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(4).

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> *Id.*

<sup>12</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49157; File No. SR-Phlx-2004-02]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Philadelphia Stock Exchange, Inc. Relating to Post-Demutualization Fees

January 30, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 7, 2004, 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 the Phlx has prepared. On January 20, 2004, the Exchange submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Phlx proposes to amend its schedule of dues, fees and charges to adopt permit fees in connection with the Exchange's proposed demutualization.<sup>4</sup> The fees relating to the issuance of Series A-1 Permits will

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Letter from Edith Halihan, Deputy General Counsel, Phlx, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated January 16, 2004 ("Amendment No. 1"). In Amendment No. 1, the Phlx made minor changes to the section of the proposed rule change describing its text to clarify the fee obligations for members associated with more than one member organization.

<sup>4</sup> In its proposed demutualization, the Phlx is seeking to convert from a non-stock corporation into a stock corporation. The Exchange has submitted a separate proposed rule change relating to the proposed demutualization. See Securities Exchange Act Release No. 48847 (November 26, 2003), 68 FR 67720 (December 3, 2003) (SR-Phlx-2003-73). The Commission notes that it approved the demutualization in Securities Exchange Act Release No. 49098 (January 16, 2004) (SR-Phlx-2003-73). As part of the demutualization, the Exchange intends to eliminate existing Exchange memberships; following demutualization, access to trading on the Exchange will be pursuant to permits rather than by ownership or leasing of Phlx memberships. The only class or series of permits to be outstanding initially will be denominated as "Series A-1 Permits." Until such time (if ever) as additional classes or series of permits are issued, the Series A-1 Permits will be referred to as "permits" on the Exchange's fee schedule.

be assessed based on how each permit is used.

The Exchange proposes the following fees:

*Order Flow Provider Permit Fee*<sup>5</sup>

a. Permits used only to submit orders to the equity, foreign currency options or options trading floor (one floor only)—\$200 per month.

b. Permits used only to submit orders to more than one trading floor—\$300 per month.

*Floor Broker, Specialist or ROT (on any trading floor) or Off-Floor Trader Permit Fee*

a. First permit—\$1,200 per month.

b. Additional permits for members in the same organization—\$1,000 per month.

Any member who is associated with one or more member organizations and uses a permit in more than one category will pay the higher of the applicable fees for such permit.<sup>6</sup>

In light of the proposed demutualization, the Exchange also proposes to make other necessary changes to Appendix A of the fee schedule.<sup>7</sup> Specifically, the following charges will be deleted from Appendix A: (1) Membership dues;<sup>8</sup> (2) charges relating to equity trading permits (“ETPs”);<sup>9</sup> (3) the Foreign Currency Options Participations (“FCOP”) Fee of \$166.67 per month; (4) the technology fee for Exchange members;<sup>10</sup> (5) the Technology Fee of \$150 per month assessed on Foreign Currency Options Participants who do not hold legal title to a Phlx membership; and (6) the capital funding fee of \$1500 per month. Also, the notation “I,” which appears on the Exchange’s fee schedule, including Appendix A, and denotes that a fee

<sup>5</sup> This fee applies to a permit held by a permit holder who does not have physical access to the Exchange’s trading floor, is not registered as a Floor Broker, Specialist or ROT (on any trading floor) or Off-Floor Trader, and whose member organization submits orders to the Exchange. See Phlx Rule 620.

<sup>6</sup> For example, if a member organization with only one permit was an order flow provider and the permit holder associated with the member organization then registered as a floor broker on the Exchange for that or another member organization, that permit would be subject to a permit fee of \$1,200 (the higher of \$200 and \$1,200, but not both fees).

<sup>7</sup> The other sections of the fee schedule will continue to apply, including transaction fees.

<sup>8</sup> Currently, Membership Dues are \$166.67 per month.

<sup>9</sup> The Exchange intends to terminate ETPs at the time of the demutualization. See Securities Exchange Act Release No. 48847 (November 26, 2003), 68 FR 67720 (December 3, 2003).

<sup>10</sup> Currently, members are assessed a technology fee of \$950. See Securities Exchange Act Release No. 48034 (June 16, 2003), 68 FR 37192 (June 23, 2003) (SR-Phlx-2003-41).

qualified for a monthly credit of up to \$1,000, will be deleted.<sup>11</sup> In addition, the following changes will be made to Appendix A: (1) The Foreign Currency User Fee will increase from \$166.67 per month to \$1,200 per month; and (2) the Transfer Fee of \$500 will be clarified to reflect that FCOP<sup>12</sup> transfers will continue to be charged a Transfer Fee of \$500.<sup>13</sup>

The Exchange also intends to make other minor technical amendments to its fee schedule relating to the renumbering of its footnotes to reflect that certain footnotes marked as “reserved” have now been deleted.

The proposed changes are to become effective upon the issuance of permits when the Exchange’s proposed demutualization becomes effective.<sup>14</sup>

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

## 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

<sup>11</sup> The monthly capital funding fee and monthly credit were previously in effect for an aggregate period of 36 months, which expired in May 2003. See Securities Exchange Act Release Nos. 42993 (June 29, 2000), 65 FR 42415 (July 10, 2001) (SR-Phlx-99-51); and 44292 (May 11, 2001), 66 FR 27715 (May 18, 2001) (SR-Phlx-2001-49).

<sup>12</sup> See current Phlx By-Law Article I, Section 1–1(m).

<sup>13</sup> Pursuant to the Exchange’s proposed demutualization, permits may not be transferred from one Exchange member organization to another, thus a Transfer Fee is inapplicable for permits. In addition, the Exchange does not intend, at this time, to charge a Transfer Fee for permit transfers within a member organization under the limited circumstances under which such transfers will be permitted under the Exchange’s proposed rules.

<sup>14</sup> The Exchange anticipates that this will occur in mid to late January 2004. However, should the closing occur other than on the last day of a month, in order to avoid double charging then current members and member organizations or increasing fees for foreign currency option participants (“participants”) and participant organizations (collectively referred to as “current members”), mid-month for membership/participant-related fees that are currently in effect, permit fees, as well as other fees that take effect post-demutualization, the demutualization fee changes scheduled to be implemented for then current members upon the issuance of permits will be implemented the first day of the next full calendar month after the closing of the demutualization occurs (and permits are issued). Therefore, if permits are issued in mid-January, the post-demutualization fee changes for then current members will be implemented beginning February 2004. That is, current membership/participant-related fees, dues, and other charges will remain in effect for the full month in which closing occurs and permit fees and other post-demutualization fee changes will take effect as of the first day of the following month. Similarly, in this example, if demutualization becomes effective in January, permit fees will be assessed that month for anyone who is not a current member prior to demutualization.

the purpose of and basis for the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of the 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 amend Appendix A of the Exchange’s schedule of dues, fees, and charges to incorporate changes that are to become effective in connection with the Exchange’s proposed demutualization. Specifically, the Exchange is adopting a permit fee structure and deleting certain other fees discussed above to accommodate trading on the Exchange post-demutualization. The Exchange also intends to make changes to its fees relating to FCOPs to generate revenue for the Exchange in order to enable it to continue to provide a marketplace for its foreign currency options and to simplify and clarify the billing for FCOPs. In addition, the Exchange proposes to delete the capital funding fee, which appears in Appendix A, and the references to the monthly credit of up to \$1,000 that appear throughout the Exchange’s schedule of dues, fees, and charges, as this fee is no longer imposed and the credit is no longer offered, by the Exchange.<sup>15</sup> The Exchange intends to renumber the footnotes that appear on its schedule of dues, fees, and charges to reflect that certain footnotes designated as “reserved” have now been deleted to avoid member confusion.

#### 2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of dues, fees and charges is consistent with Section 6(b) of the Act<sup>16</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>17</sup> in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among Exchange members. The Exchange believes that the proposed permit fee structure is reasonable, because \$1,000–\$1,200 per month per permit holder approximates the membership-related fees currently charged by the Exchange for most members (\$950 technology fee

<sup>15</sup> See *supra* note 11.

<sup>16</sup> 15 U.S.C. 78f(b).

<sup>17</sup> 15 U.S.C. 78f(b)(4).

plus approximately \$167 for membership dues). Moreover, the Exchange believes that charging \$200 more for the first permit in each member organization is reasonable and equitable, in light of the administration of a member organization's registration; the first "membership" or permit qualifies a member organization, which requires certain registration, filing and processing by the Exchange.<sup>18</sup> The Exchange believes that the \$200–\$300 monthly fee for order flow providers should attract order flow providers as well as reflect their limited, order entry access.<sup>19</sup> Order flow providers will not take up space and resources on the Phlx trading floor or use floor services to the same extent as Phlx floor-based members. The Exchange believes that this proposal to impose permit fees depending on how a permit is used is both reasonable and equitable, similar to its current ETP structure.<sup>20</sup> The Exchange also believes that the proposed increased Foreign Currency User Fee is reasonable and equitable because, although the fee will increase substantially from current membership fees for FCOPs who do not also hold legal title to a Phlx membership,<sup>21</sup> it will be more closely aligned with permit fees, such that access to Phlx products will be similarly priced.<sup>22</sup>

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

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

<sup>18</sup> Similarly, the Exchange's current fee schedule reflects that ETP fees are discounted for multiple memberships. The fee respecting ETPs is \$3,500 per month per ETP ("Regular ETP"), however a Regular ETP 3-Seat Fee of \$1,350 per month per ETP is charged for Regular ETP holders and ETP organizations in lieu of the Regular ETP Fee if the ETP organization has at all times at least three associated persons who are members of the Exchange by virtue of a membership, whether owned or leased. See Securities Exchange Act Release No. 45480 (February 26, 2002), 67 FR 10029 (March 5, 2002) (SR-Phlx-2002-10).

<sup>19</sup> This is similar to the current Off-Floor ETP fee of \$500 per month per ETP, which is charged to Off-Floor ETP holders, while Regular ETPs are \$3,500 per month per ETP, the Regular ETP 3-Seat Fee is \$1,350 per month per ETP and the Regular ETP RS Fee is \$1,000 per month per ETP. See Securities Exchange Act Release Nos. 45480 (February 26, 2002), 67 FR 10029 (March 5, 2002) (SR-Phlx-2002-10) and 48925 (December 15, 2003), 68 FR 70855 (December 19, 2003) (SR-Phlx-2003-78).

<sup>20</sup> *Id.*

<sup>21</sup> In terms of membership-type fees, currently, FCOPs who do not hold legal title to a Phlx membership are assessed a technology fee of \$150 monthly in lieu of the \$950 monthly technology fee. In addition, they are assessed a Foreign Currency User fee of \$166.67 and a FCOP fee of \$166.67 per month. Of course, as stated above, other non-membership fees, such as transaction fees, may apply to FCOPs.

<sup>22</sup> FCOPs may, of course, determine to dispose of their FCOP and apply for a permit instead.

any inappropriate burden on competition.

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

The Phlx neither solicited nor received written comments on this proposal.

#### **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 Act<sup>23</sup> and Rule 19b-4(f)(2) thereunder.<sup>24</sup> 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, 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. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-Phlx-2004-02. 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 hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be

<sup>23</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>24</sup> 17 CFR 240.19b-4(f)(2).

available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR-Phlx-2004-02, and should be submitted by February 27, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>25</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-49163; File No. SR-Phlx-2003-89]

### **Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendments No. 1 and 2 Thereto by the Philadelphia Stock Exchange, Inc. Relating to the Extension of a Linkage Fee Pilot Program**

January 30, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 31, 2003, the Philadelphia Stock Exchange, Inc. ("Exchange" or "Phlx") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On January 26, 2004, the Exchange submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> On January 29, 2004, the Exchange submitted Amendment No. 2 to the proposed rule change.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and is approving the proposed rule change, as amended, on an accelerated basis.

<sup>25</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See letter from Angela Saccomandi Dunn, Counsel, Phlx to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated January 23, 2004. ("Amendment No. 1"). Amendment No. 1 replaced and superseded the original proposed rule change in its entirety.

<sup>4</sup> See letter from Angela Saccomandi Dunn, Counsel, Phlx to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated January 29, 2004. ("Amendment No. 2"). Amendment No. 2 replaced and superseded Amendment No. 1 in its entirety.