

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

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

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

The foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, and, therefore, has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>5</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder.<sup>6</sup> 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 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. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-PCX-2004-88 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File No. SR-PCX-2004-88. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of PCX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-PCX-2004-88 and should be submitted on or before October 26, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-50471; File No. SR-PHLX-2004-60]

**Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to its Equity Options Payment for Order Flow Program**

September 29, 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 September 22, 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 Items have been prepared by the Exchange. The Phlx has designated this proposal as one changing a fee imposed by the Phlx under Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to

<sup>1</sup> 17 CFR 200.30-3(a)(12).

<sup>2</sup> 15 U.S.C. 78s(b)(1).

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>5</sup> 17 CFR 240.19b-4(f)(2).

solicit comments on the proposed rule change from interested persons.

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

The Phlx proposes to amend its schedule of dues, fees, and charges to revise its equity options payment for order flow program.

*Equity Options Payment for Order Flow Program Prior to September 22, 2004*

The Exchange recently amended its equity options payment for order flow program.<sup>5</sup> Pursuant to that program, for trades settling on or after August 2, 2004, the Exchange assessed a payment for order flow fee as follows when Registered Options Traders ("ROTs") traded against a customer order: (1) \$1.00 per contract for options on the Nasdaq-100 Index Tracking Stock<sup>SM</sup> traded under the symbol QQQ;<sup>6</sup> and (2) \$0.35 per contract for all other equity options. The ROT payment for order flow fee is not assessed on transactions between: (1) A specialist and a ROT; (2) a ROT and a ROT; (3) a ROT and a firm;<sup>7</sup> and (4) a ROT and a broker-dealer.<sup>8</sup> The ROT payment for order flow fee does not apply to index options or foreign currency options. Accordingly, the ROT payment for order flow fee applies, in effect, to equity option transactions between a ROT and a customer. In addition, a 500 contract cap per

<sup>5</sup> See SR-Phlx-2004-50 and SR-Phlx-2004-56. See *infra* note 19 for a discussion of the status of these filings.

<sup>6</sup> QQQ is currently the most actively-traded equity option. The Nasdaq-100<sup>®</sup>, Nasdaq-100 Index<sup>®</sup>, Nasdaq<sup>®</sup>, The Nasdaq Stock Market<sup>®</sup>, Nasdaq-100 Shares<sup>SM</sup>, Nasdaq-100 Trust<sup>SM</sup>, Nasdaq-100 Index Tracking Stock<sup>SM</sup>, and QQQ<sup>SM</sup> are trademarks or service marks of The Nasdaq Stock Market, Inc. ("Nasdaq") and have been licensed for use for certain purposes by the Phlx pursuant to a License Agreement with Nasdaq. The Nasdaq-100 Index<sup>®</sup> ("Index") is determined, composed, and calculated by Nasdaq without regard to the Licensee, the Nasdaq-100 Trust<sup>SM</sup>, or the beneficial owners of Nasdaq-100 Shares<sup>SM</sup>. Nasdaq has complete control and sole discretion in determining, comprising, or calculating the Index or in modifying in any way its method for determining, comprising, or calculating the Index in the future.

<sup>7</sup> For the purposes of the equity options payment for order flow program, a firm is defined as a proprietary account of a member firm, and not the account of an individual member.

<sup>8</sup> For purposes of the equity options payment for order flow program, broker-dealer orders are orders, entered from other than the floor of the Exchange, for any account (i) in which the holder of beneficial interest is a member or non-member broker-dealer or (ii) in which the holder of beneficial interest is a person associated with or employed by a member or non-member broker-dealer. This includes orders for the account of an ROT entered from off-the-floor.

<sup>5</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>6</sup> 17 CFR 240.19b-4(f)(2).

individual cleared side of a transaction is imposed.<sup>9</sup>

Specialist units<sup>10</sup> elect to participate or not to participate in the program in all options in which they are acting as a specialist by notifying the Exchange in writing no later than five business days prior to the start of the month.<sup>11</sup> If electing not to participate in the program, the specialist unit waives its right to any reimbursement of payment for order flow funds for the month(s) during which it elected to opt out of the program.<sup>12</sup>

Specialist units may opt out entirely from the equity options payment for order flow program, as long as they notify the Exchange in writing by the 15th of the month.<sup>13</sup> If a specialist unit opts out of the program by the 15th of the month, no payment for order flow charges will be incurred for either the specialist unit or ROTs for transactions in the affected options for that month.

If a specialist unit opts into the program, and does not request reimbursement of at least 50% of the total amount of payment for order flow

funds collected from ROTs in the options for which that specialist unit is acting as the specialist, then that specialist unit will be required to pay payment for order flow fees for that month at the same rate as the ROTs.

The Exchange bills the ROTs and collects the payment for order flow fees from the ROTs on a monthly basis.<sup>14</sup> The collected funds will be used by each specialist unit to reimburse it for monies expended to attract options orders to the Phlx by making payments to order flow providers who provide order flow to the Exchange. Each specialist will establish the amounts that will be paid to order flow providers. Specialists receive their respective funds only after submitting an Exchange certification form identifying the amount of the requested funds.<sup>15</sup> Because the specialists are not being charged the payment for order flow fee for their own transactions, they may not request reimbursement for order flow funds in connection with any transactions to which they were a party.<sup>16</sup>

The Exchange may audit a specialist's payments to payment-accepting firms to

<sup>9</sup> Under the Exchange's equity options payment for order flow program, a 500 contract cap per individual cleared side of a transaction is imposed. Thus, the applicable payment for order flow fee is imposed only on the first 500 contracts, per individual cleared side of a transaction. For example, if a transaction consists of 750 contracts by one ROT, the applicable payment for order flow fee would be applied to, and capped at, 500 contracts for that transaction. Also, if a transaction consists of 600 contracts, but is equally divided among three ROTs, the 500 contract cap would not apply to any such ROT and each ROT would be assessed the applicable payment for order flow fee on 200 contracts, as the payment for order flow fee is assessed on a per ROT, per transaction basis. See Securities Exchange Act Release Nos. 47958 (May 30, 2003), 68 FR 34026 (June 6, 2003) (proposing SR-Phlx-2002-87); and 48166 (July 11, 2003), 68 FR 42450 (July 17, 2003) (approving SR-Phlx-2002-87). See also SR-Phlx-2004-50.

<sup>10</sup> The terms "specialist" and "specialist unit" are used interchangeably herein.

<sup>11</sup> A specialist unit must notify the Exchange in writing to either elect to participate or not to participate in the program. Once a specialist unit has either elected to participate or not to participate in the Exchange's equity options payment for order flow program in a particular month, it is not required to notify the Exchange in a subsequent month, as described above, if it does not intend to change its participation status. For example, if a specialist unit elected to participate in the program and provided the Exchange with the appropriate notice, that specialist unit would not be required to notify the Exchange in the subsequent month(s) if it intends to continue to participate in the program. However, if it elects not to participate (a change from its current status), it would need to notify the Exchange in accordance with the requirements stated above.

<sup>12</sup> For any month (or part of a month where an option is allocated mid-month) the specialist unit has elected to opt out of the program, no ROT payment for order flow fee will apply.

<sup>13</sup> If the 15th of the month is not a business day, the specialist unit may notify the Exchange of its desire to opt out of the program by the next business day.

<sup>14</sup> Originally, in filing SR-Phlx-2004-50, the Exchange proposed that the collected payment for order flow fees be combined in one account to form a "pool." If, after taking into account all requests for reimbursement in a given month, the amount in the pool would be insufficient to satisfy all such requests, then the reimbursement requests would be reduced on a proportionate basis among the requesting specialists for that month based on contracts executed by ROTs in the specialists' respective options. The amount by which the requests exceed the proportionate reimbursement may not be recovered in future months (and would not carry forward as claims against the pool). If there were any excess funds after monthly reimbursements, those funds would carry forward to be used for future requests. The Exchange subsequently proposed to amend this aspect of its equity options payment for order flow program. For the month of August 2004, the Exchange has proposed to require specialists to request reimbursement for payment for order flow funds on an option-by-option basis and that any excess payment for order flow funds collected but not reimbursed to specialists would be rebated back to the affected ROTs on an option-by-option basis. See SR-Phlx-2004-61.

<sup>15</sup> While all determinations concerning the amount that will be paid for orders and which order flow providers shall receive these payments will be made by the specialists, the specialists will provide to the Exchange on an Exchange form certain information, such as what firms they paid for order flow, the amount of the payment and the price paid per contract. The purpose of the form, in part, is to assist the Exchange in determining the effectiveness of the proposed fee and to account for and track the funds transferred to specialists, consistent with normal bookkeeping and auditing practices. In addition, certain administrative duties will be provided by the Exchange to assist the specialists.

<sup>16</sup> The amount a specialist may receive in reimbursement is limited to the percentage of ROT monthly volume to total specialist and ROT monthly volume in the equity options payment for order flow program.

verify the use and accuracy of the payment for order flow funds remitted to the specialists based on their certification.<sup>17</sup>

The Exchange also continues to implement a quality of execution program.<sup>18</sup>

The above referenced program was in effect for trades settling on or after August 2, 2004.<sup>19</sup>

#### *Proposed Equity Options Payment for Order Flow Program Commencing September 22, 2004*

The Exchange proposes to charge a payment for order flow fee on transactions by Phlx ROTs of \$1.00 per contract for options on the QQQ, currently the most actively traded equity option, and \$0.40 per contract for the remaining top 150 equity options, other than the QQQ.<sup>20</sup> The payment for

<sup>17</sup> See Exchange Rule 760.

<sup>18</sup> See, e.g., Securities Exchange Act Release No. 43436 (October 11, 2000), 65 FR 63281 (October 23, 2000) (SR-Phlx-2000-83).

<sup>19</sup> See SR-Phlx-2004-50 and SR-Phlx-2004-56, originally filed with the Commission on July 29, 2004 (subsequently amended on August 16, 2004) and August 16, 2004, respectively. These proposed rule changes were in effect until the Commission issued an abrogation order on September 22, 2004, which effectively rescinded the proposed rule changes as of the date of abrogation. See Securities Exchange Act Release No. 50420 (September 22, 2004). In addition, on August 31, 2004, the Exchange filed SR-Phlx-2004-58 with the Commission, which proposed to increase the payment for order flow fee of \$0.35 per contract to \$0.40 per contract for all equity options, other than options on the QQQ, to be effective for trades settling on or after September 1, 2004. On September 22, 2004, the Exchange withdrew SR-Phlx-2004-58 and filed with the Commission SR-Phlx-2004-60 and SR-Phlx-2004-61, which are intended to address payment for order flow fees imposed on trades settling on or after September 1, 2004.

In SR-Phlx-2004-50, the Phlx also made a technical update to a footnote on the first page of the Exchange's Summary of Equity Option Charges by deleting a page reference and inserting a reference to a section header in its place.

<sup>20</sup> The top 150 options will be calculated based on the most actively traded equity options in terms of the total number of contracts that are traded nationally, based on volume statistics provided by the Options Clearing Corporation ("OCC") and that are also traded on the Exchange. For example, if two of the most actively traded equity options, based on volume statistics provided by the OCC are not traded on the Exchange, then the next two most actively traded equity options that are traded on the Exchange will be selected. (For example, if the list of the top 150 options includes two options that are not traded on the Exchange, then the options ranked 151 and 152 will be included in the Exchange's top 150, assuming those options are traded on the Exchange). The measuring periods for the top 150 options will be calculated every three months. For example, for trade months September, October and November, the measuring period to determine the top 150 options will be based on volume statistics from May, June and July. This cycle will continue every three months. Members will be notified of the top 150 options approximately two weeks before the beginning of a

order flow fee will continue to apply to customer orders.<sup>21</sup> In addition, the 500 contract cap per individual cleared side of a transaction will continue to be imposed.<sup>22</sup>

The payment for order flow fee will be billed and collected on a monthly basis. Because the specialists are not being charged the payment for order flow fee for their own transactions, they may not request reimbursement for order flow funds in connection with any transactions to which they were a party.<sup>23</sup>

Specialists will request payment for order flow reimbursements on an option-by-option basis. The collected funds will be used by each specialist unit to reimburse it for monies expended to attract options orders to the Exchange by making payments to order flow providers who provide order flow to the Exchange. They will receive their respective funds only after submitting an Exchange certification form identifying the amount of the requested funds.<sup>24</sup> Each specialist unit will

new three-month trading period. As discussed below, the payment for order flow fees are incurred only when the specialist elects to participate in the equity options payment for order flow program. The Exchange's fee schedule will reflect the fee of \$1.00 for options on the QQQ and \$0.40 for the remaining top 150 equity options, other than the QQQ. Any change to the rate at which the payment for order flow fee is assessed would be the subject of a separate proposed rule change filed with the Commission.

<sup>21</sup> Thus, consistent with current practice, the ROT payment for order flow fee is not assessed on transactions between: (1) A specialist and a ROT; (2) a ROT and a ROT; (3) a ROT and a firm; and (4) a ROT and a broker-dealer. The ROT payment for order flow fee does not apply to index options or foreign currency options. Accordingly, the ROT payment for order flow fees applies, in effect, to equity option transactions between a ROT and a customer.

<sup>22</sup> See *supra* note 9.

<sup>23</sup> The amount a specialist may receive in reimbursement is limited to the percentage of ROT monthly volume to total specialist and ROT monthly volume in the equity options payment for order flow program. For example, if a specialist unit has a payment for order flow arrangement with an order flow provider to pay that order flow provider \$0.70 per contract for order flow routed to the Exchange and that order flow provider sends 90,000 customer contracts to the Exchange in one month for one option, then the specialist would be required, pursuant to its agreement with the order flow provider, to pay the order flow provider \$63,000 for that month. Assuming that the 90,000 represents 30,000 specialist transactions, 20,000 ROT transactions and 40,000 transactions from firms, broker-dealers and other customers, the specialist may request reimbursement of up to 40% (20,000/50,000) of the amount paid (\$63,000 x 40%=\$25,200). However, because the ROTs will have paid \$8,000 into the payment for order flow fund for that month, the specialist may collect only \$8,000 (20,000 contracts x \$0.40 per contract) of its \$25,200 reimbursement request plus, if applicable, any excess funds for that particular option carried over from a prior month up to the specialist's \$25,200 reimbursement request.

<sup>24</sup> See *supra* note 15.

establish the amounts that will be paid to order flow providers.

Any excess payment for order flow funds will be carried forward to the next month by option and may not be applied retroactively to past deficits, which may be incurred when the specialist requests more than the amount collected.<sup>25</sup> Thus, excess funds will not be rebated to ROTs except in the limited situation discussed below, nor will deficits carry forward to subsequent months. ROTs may, however, receive a rebate of excess funds in a particular option for a particular month if the specialist unit does not request reimbursement by option of at least 50% of the total amount of payment for order flow funds billed to and collected from ROTs for each option in which that specialist unit is acting as specialist, as more fully described below. The Exchange will periodically review its equity options payment for order flow program to determine whether a cap on the amount collected for each option should be imposed in the future.<sup>26</sup>

Consistent with the Exchange's current equity options payment for order flow program, specialists units may opt out entirely from the program as long as they notify the Exchange in writing by the 15th of the month, or the next business day if the 15th of the month is not a business day. If a specialist unit opts out of the program by the 15th of the month, no payment for order flow charges will be incurred for either the specialist unit or ROTs for transactions in the affected options for that month.

In addition to opting out entirely from the program, specialists may opt out of the program on an option-by-option basis if they notify the Exchange in writing no later than three business days after the end of the month (which is before the payment for order flow fee is billed). If a specialist unit opts out of an option at the end of the month then no payment for order flow fees will be assessed on the applicable ROT(s) for that option. If a specialist unit opts out of the program in a particular option more than two times in a six-month period, it will be precluded from

<sup>25</sup> Specialists may not receive more than the payment for order flow amount billed and collected in a given month; however, the amounts specialists receive may include excesses, if any, for that option, carried forward from prior months, up to the payment for order flow amount billed and collected in such month. Telephone conversation between Cynthia K. Hoekstra, Counsel, Phlx, and David Liu, Attorney, Division of Market Regulation, Commission, on September 24, 2004.

<sup>26</sup> Any such cap would have to be filed with the Commission as a proposed rule change under Section 19(b)(1) of the Act.

entering into the equity options payment for order flow program for that option for the next three months.

If a specialist unit opts into the program (and does not opt out of the program entirely by the 15th day of the month or by option by the third business day after the end of the month) and does not request reimbursement by option of at least 50% of the total amount of payment for order flow funds billed to and collected from ROTs for each option in which that specialist unit is acting as the specialist, then any excess payment for order flow funds remaining after the specialist has been reimbursed will be rebated, on a pro rata basis, to the affected ROTs for those particular options in which the 50% threshold was not met.<sup>27</sup>

Consistent with current practice, the Exchange may audit a specialist's payments to payment-accepting firms to verify the use and accuracy of the payment for order flow funds remitted to the specialists based on their certification.<sup>28</sup>

The Exchange will also continue to implement a quality of execution program.<sup>29</sup> Other aspects of the Exchange's equity options payment for order flow program will remain unchanged.<sup>30</sup>

The payment for order flow fees as set forth in this proposal would be in effect for trades settling on or after September 22, 2004.<sup>31</sup>

<sup>27</sup> For example, if a specialist unit requests \$10,000 in reimbursement for one option and the total amount billed and collected from the ROTs was \$30,000, then the specialist unit did not satisfy the 50% threshold, given the fact that it did not request reimbursement of at least \$15,000. Therefore, the remaining amount of \$20,000 will be rebated to the ROTs on a pro rata basis. If ROT A was assessed \$15,000 in payment for order flow fees, he would receive a rebate of \$10,000 (\$15,000/\$30,000 = 50% and 50% of \$20,000 is \$10,000). If ROT B was assessed \$8,000 in payment for order flow fees, it would receive \$5,333.33, which represents 26.67% (\$8,000/\$30,000) of \$20,000. If ROT C was assessed \$7,000 in payment for order flow fees, it would receive \$4,666.67, which represents 23.33% (\$7,000/\$30,000) of \$20,000.

<sup>28</sup> See Exchange Rule 760.

<sup>29</sup> See, e.g., Securities Exchange Act Release No. 43436 (October 11, 2000), 65 FR 63281 (October 23, 2000) (SR-Phlx-2000-83).

<sup>30</sup> For example, specialists will elect to participate or not to participate in all options in which they are acting as a specialist by notifying the Exchange in writing no later than five business days prior to the start of the month. Once a specialist unit elects to participate or not to participate in the program, the specialist does not have to notify the Exchange in a subsequent month if it does not intend to change its participation status. (See *supra* note 11). Specialists will waive the right to reimbursement of payment for order flow funds for the month(s) during which it elected to opt out of the program.

<sup>31</sup> Because SR-Phlx-2004-50 has no legal effect as of the date of its abrogation, the Exchange's Summary of Equity Option Charges reflects changes that were proposed in SR-Phlx-2004-50. The Exchange has also filed a separate proposed rule

Below is the text of the proposed rule change. Proposed new language is in *italics*; deletions are in [brackets].

**SUMMARY OF EQUITY OPTION CHARGES (p. 1/[3]3)**

OPTION COMPARISON CHARGE (applicable to all trades—except specialist trades)

\* \* \* \* \*

+ Subject to a maximum fee of \$50,000, except for QQQ license fees of

\$0.10 per contract side—see [“Firm Related” Equity Option and Index Option Cap.] *\$50,000 “Firm Related” Equity Option and Index Option Cap.*

^ Specialists may also elect to pay a fixed fee monthly charge, see Specialist Unit Fixed Monthly Fee described below.

\* ROTs are eligible for a \$.08/contract side rebate and specialists who have not elected the fixed monthly fee are eligible for a \$.07/contract side rebate

for trades occurring as part of a dividend spread strategy.

⊕ These fees are waived from May 1, 2004 until August 31, 2004 for transactions in equity options that begin trading on the Exchange between January 1, 2004 and June 30, 2004.

Footnotes 9–13—no change.

**SUMMARY OF EQUITY OPTION CHARGES (p. 2/[3]3)**

\* \* \* \* \*

**[SUMMARY OF EQUITY OPTION CHARGES (P. 3/3)  
[EQUITY OPTION PAYMENT FOR ORDER FLOW FEES\*]**

[Registered Option Trader (on-floor): \*\* +

QQQ (NASDAQ-100 Index Tracking Stock <sup>SM</sup> ) .....	\$1.00 per contract.
Remaining equity options subject to charge .....	\$0.35 per contract.

\* Assessed on transactions resulting from customer orders

\*\* Subject to a 500-contract cap, per individual cleared side of a transaction.

+ Only incurred when the specialist elects to participate in the payment for order flow program]

**SUMMARY OF EQUITY OPTION CHARGES (p. 3/3)  
EQUITY OPTION PAYMENT FOR ORDER FLOW FEES\***

Registered Option Trader (on-floor)\*\* +

QQQ (NASDAQ-100 Index Tracking Stock <sup>SM</sup> ) .....	\$1.00 per contract.
Remaining Top 150 Equity Options .....	\$0.40 per contract.

\* Assessed on transactions resulting from customer orders, subject to a 500-contract cap, per individual cleared side of a transaction

\*\* Any excess payment for order flow funds will be carried forward to the next month by option and will not be rebated to ROTs. ROTs may, however, receive a rebate of any excess funds in a particular option for a particular month if the specialist unit does not request reimbursement by option of at least 50% of the total amount of payment for order flow funds billed and collected from ROTs for each option in which that specialist unit is acting as specialist.

+ Only incurred when the specialist elects to participate in the payment for order flow program

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

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

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

**1. Purpose**

The Exchange represents that the purpose of the proposed rule change is to adopt a more competitive equity options payment for order flow program. Equity options payment for order flow programs are in place at each of the other options exchanges. The Exchanges states that the revenue

generated by the \$1.00 or \$0.40 payment for order flow fees, as outlined in this proposal, is intended to be used by specialist units to compete for order flow in equity options listed for trading on the Exchange. The Exchange believes that, in today's competitive environment, changing its equity options payment for order flow program to compete more directly with other options exchanges is important and appropriate.

The Phlx states that the purpose of imposing the 50% threshold is to encourage specialists to have payment for order flow arrangements in place before electing to participate in the Exchange's equity options payment for order flow program.

**2. 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>32</sup> in general, and furthers the objectives of Sections 6(b)(4) of the Act<sup>33</sup> in particular, in that it is an equitable allocation of reasonable fees among Phlx members and that it is designed to enable the

Exchange to compete with other markets in attracting customer order flow. Because the payment for order flow fees are collected only from member organizations respecting customer transactions, the Phlx believes that there is a direct and fair correlation between those members who fund the equity options payment for order flow fee program and those who receive the benefits of the program. The Exchange states that ROTs also potentially benefit from additional customer order flow. In addition, the Phlx believes that the proposed payment for order flow fees would serve to enhance the competitiveness of the Phlx and its members and that this proposal therefore is consistent with and furthers the objectives of the Act, including Section 6(b)(5) thereof,<sup>34</sup> which requires the rules of exchanges to be designed to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Phlx believes that attracting more order flow to the Exchange should, in turn, result in increased liquidity,

change to implement the payment for order flow fee, as outlined in this proposal, to be in effect for trades settling on or after September 1, 2004

through September 21, 2004. See SR-Phlx-2004-61.

<sup>32</sup> 15 U.S.C. 78f(b).

<sup>33</sup> 15 U.S.C. 78f(b)(4).

<sup>34</sup> 15 U.S.C. 78f(b)(5).

tighter markets and more competition among exchange members.

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

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

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

No written comments were either solicited or received.<sup>35</sup>

### **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>36</sup> and Rule 19b-4(f)(2)<sup>37</sup> thereunder, because it establishes or changes a due, fee, or other charge imposed by the Exchange. Accordingly, the proposal will take effect upon filing with the Commission. At any time within 60 days of the filing of such 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 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. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-PHLX-2004-60 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

<sup>35</sup> Previously, in connection with SR-PHLX-2004-50, the Exchange received one written comment letter dated August 10, 2004, which was forwarded to the Commission on August 20, 2004.

<sup>36</sup> 15 U.S.C. 78s(b)(A)(ii).

<sup>37</sup> 17 CFR 240.19b-4(f)(2).

All submissions should refer to File Number SR-PHLX-2004-60. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-PHLX-2004-60 and should be submitted on or before October 26, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>38</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E4-2489 Filed 10-4-04; 8:45 am]

**BILLING CODE 8010-01-P**

### **SMALL BUSINESS ADMINISTRATION**

#### **Declaration of Disaster #3624; State of Alabama (Amendment #1)**

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency—effective September 23, 2004, the above numbered declaration is hereby amended to include Autauga, Barbour, Bibb, Blount, Bullock, Calhoun, Chilton, Choctaw, Clay, Coosa, Cullman, Dallas, Dale, Elmore, Etowah, Fayette, Franklin, Greene, Hale, Jefferson, Lamar, Lawrence, Lee, Lowndes, Macon, Marengo, Marshall, Marion, Montgomery, Perry, Pickens, Pike, Shelby, St. Clair, Sumter, Talladega, Tallapoosa, Tuscaloosa, Walker, Wilcox, and Winston as disaster areas due to

<sup>38</sup> 17 CFR 200.30-3(a)(12).

damages caused by Hurricane Ivan occurring on September 13, 2004 and continuing.

In addition, applications for economic injury loans from small businesses located in the contiguous counties of Chambers, Cherokee, Cleburne, Colbert, DeKalb, Henry, Jackson, Lauderdale, Limestone, Madison, Morgan, Randolph, and Russell in the State of Alabama; Clay, Harris, Muscogee, Quitman, and Stewart in the State of Georgia; and Clarke, Itawamba, Kemper, Lauderdale, Lowndes, Monroe, Noxubee, and Tishomingo in the State of Mississippi may be filed until the specified date at the previously designated location. All other counties contiguous to the above named primary counties have previously been declared.

The economic injury number assigned to Georgia is 9AA500.

All other information remains the same, *i.e.*, the deadline for filing applications for physical damage is November 15, 2004 and for economic injury the deadline is June 15, 2005.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: September 27, 2004.

**Herbert L. Mitchell,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 04-22291 Filed 10-4-04; 8:45 am]

**BILLING CODE 8025-01-P**

### **SMALL BUSINESS ADMINISTRATION**

#### **[Declaration of Disaster #3635]**

#### **State of Florida**

As a result of the President's major disaster declaration on September 26, 2004, and a notice received from the Department of Homeland Security—Federal Emergency Management Agency—on September 27, 2004, I find that Brevard, Hardee, Hernando, Highlands, Hillsborough, Indian River, Lake, Marion, Martin, Okeechobee, Orange, Osceola, Palm Beach, Pasco, Pinellas, Polk, Seminole, St. Lucie, Sumter, and Volusia Counties in the State of Florida constitute a disaster area due to damages caused by Hurricane Jeanne occurring on September 24, 2004 and continuing. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on November 26, 2004 and for economic injury until the close of business on June 27, 2005 at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 2 Office, One Baltimore Place, Suite 300, Atlanta, GA 30308.