

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50734; File No. SR-NYSE-2004-48]

### Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change To Create New NYSE Rule 416A ("Member and Member Organization Profile Information Updates and Quarterly Certifications Via the Electronic Filing Platform") and To Amend NYSE Rule 476A ("Imposition of Fines for Minor Violations of Rules"), Adding New NYSE Rule 416A to the "List of Exchange Rule Violations and Fines Applicable Thereto Pursuant to Rule 476A"

November 24, 2004.

On August 19, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to adopt new NYSE Rule 416A ("Member and Member organization Profile Information Updates and Quarterly Certifications Via the Electronic Filing Platform"), which rule would require members and member organizations to promptly update their organizational information via the Electronic Filing Platform, and to make quarterly certifications that their organizational information is complete and accurate. Additionally, the NYSE proposed an amendment to NYSE Rule 476A ("Imposition of Fines for Minor Violations of Rules") to allow the Exchange to sanction members' and member organizations' minor violations of new NYSE Rule 416A pursuant to the minor fine provisions of NYSE Rule 476A. The NYSE amended the proposed rule change on October 12, 2004, which amendment completely replaced and superseded the original proposal. The proposed rule change, as amended, was published for comment in the **Federal Register** on October 25, 2004.<sup>3</sup> The Commission received no comments on the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities

exchange<sup>4</sup> and, in particular, the requirements of Section 6 of the Act<sup>5</sup> and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>6</sup> in that it is designed to promote just and equitable principles of trade, facilitate transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission also finds that the proposal is consistent with Section 6(b)(6) of the Act,<sup>7</sup> which requires that members and persons associated with members be appropriately disciplined for violations of Exchange rules. Finally, the Commission finds the proposal is consistent with Rule 19d-1(c)(2) under the Act,<sup>8</sup> which governs minor rule violation plans.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>9</sup> that the proposed rule change (SR-NYSE-2004-48), as amended, be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50727; File No. SR-Phlx-2004-66]

### Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change Relating to Concentration Limit Listing Standards in Phlx Rule 1009A

November 23, 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 October 7, 2004, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange")

<sup>4</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>5</sup> 15 U.S.C. 78f.

<sup>6</sup> 15 U.S.C. 78f(b)(5).

<sup>7</sup> 15 U.S.C. 78f(b)(6).

<sup>8</sup> 17 CFR 240.19d-1(c)(2).

<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</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.

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 Phlx. On October 25, 2004, the Exchange filed 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 Exchange proposes to amend Phlx Rule 1009A, Designation of the Index, which applies to the listing of index options. Specifically, the Exchange proposes to increase certain concentration limit listing standards set forth in Phlx Rule 1009A(b) pursuant to which the Exchange may list certain narrow-based index options pursuant to Commission Rule 19b-4(e).<sup>4</sup> The text of the proposed rule change is set forth below. Proposed new language is *italicized*; proposed deletions are [in brackets].

#### Rule 1009A

(a) No Change.

(b) Notwithstanding paragraph (a) above, the Exchange may trade options on a narrow-based index pursuant to Rule 19b-4(e) of the Exchange Act, if each of the following conditions is satisfied:

(1)-(5) No Change.

(6) No single component security represents more than [25%] 30% of the weight of the index, and the five highest weighted component securities in the index do not in the aggregate account for more than 50% ([60%] 65% for an index consisting of fewer than 25 component securities) of the weight of the index;

(i) With respect to the Gold/Silver Index, no single component shall account for more than 35% of the weight of the Index and the three highest weighted components shall not account for more than 65% of the weight of the Index. If the Index fails to meet this requirement, the Exchange shall reduce position limits to 8000 contracts on the Monday following expiration of the farthest-out, then trading, non-LEAP series.

(7)-(12) No Change.

<sup>3</sup> See letter from Carla Behnfeldt, Director, Legal Department New Product Development Group, Phlx to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated October 22, 2004 ("Amendment No. 1"), in which the Phlx provided rationale for and requested accelerated approval of the proposed rule change.

<sup>4</sup> 17 CFR 240.19b-4(e).

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

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

<sup>3</sup> See Securities Exchange Act Release No. 50559 (October 19, 2004), 69 FR 62314.

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

In its filing with the Commission, as amended, 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 purpose of the proposed rule change is to increase certain concentration limit listing standards in Phlx Rule 1009A. On December 6, 2000, the Commission approved a Phlx proposed rule change adopting Phlx Rule 1009A(b)<sup>5</sup> that provides generic listing standards for the listing and trading of narrow-based index options in accordance with the Commission's New Product Release.<sup>6</sup> Under Phlx Rule 1009A(b) the Exchange may trade options on a narrow-based index without filing a proposed rule change under Section 19(b)(2) of the Act if certain conditions are satisfied.<sup>7</sup> One of these conditions is set forth in Phlx Rule 1009A(b)(6), which prescribes certain concentration limits applicable to the most highly weighted component of the index and to the top five most highly weighted components combined. Specifically, the rule currently requires that no single component security represents more than 25% of the weight of the index, and that the five highest weighted component securities in the index do not in the aggregate account for more than 50% (60% for an index consisting of fewer than 25 component securities) of the weight of the index. The Exchange is now proposing to amend Phlx Rule 1009A(b)(6) by

increasing the 25% concentration limit for the highest weighted component stock to 30%. The amendment would also increase the 60% concentration limit for the five most highly weighted stocks in an index consisting of fewer than 25 component securities from 60% to 65%.

The proposed rule change would result in increased flexibility in the Exchange's ability to list narrow-based index options. The proposal will also reduce the instances in which the addition of new series is restricted pursuant to Phlx Rule 1009A(c), the maintenance listing standards applicable to options listed under Phlx Rule 1009A(b), because changes in the market value of underlying index components has caused them to exceed the current 25% or 60% limits by a very slight amount as has occasionally occurred in the past. The Exchange believes that these changes are appropriate because they are minor in nature, such that the concentration limit listing standards will continue to serve the purpose for which they were originally intended of not permitting a single security or small number of securities to dominate the index.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>8</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>9</sup> in particular, in that it should increase the availability for listing of narrow-based index options, thus enhancing the number of investment choices for investors.

### 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 self-regulatory organization 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, as amended, 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-2004-66 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 Number SR-Phlx-2004-66. 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 the 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-2004-66 and should

<sup>5</sup> See Securities Exchange Act Release No. 43683 (December 6, 2000), 65 FR 78235 (December 14, 2000).

<sup>6</sup> See Securities Exchange Act Release No. 40761 (December 8, 1998), 63 FR 70952 (December 22, 1998) ("New Product Release").

<sup>7</sup> The Commission approved an amendment to Phlx Rule 1009A to provide that certain narrow-based index options that meet generic listing standards may be listed and traded on the Exchange without a filing pursuant to Rule 19b-4(e) under the Act. See Securities Exchange Act Release No. 43683 (December 6, 2000), 65 FR 78235 (December 14, 2000) (SR-Phlx-2000-67).

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

<sup>9</sup> 15 U.S.C. 78f(b)(5).

be submitted on or before December 22, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50722; File No. SR-Phlx-2004-72]

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

November 23, 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 November 1, 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 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 revise its equity options payment for order flow program that is scheduled to be in effect beginning with trades settling on or after November 1, 2004 ("November Program"),<sup>5</sup> to credit Registered Options Traders ("ROT") for payment for order flow fees assessed for trades settling November 1, 2004, through November 12, 2004, in options ranked greater than the top 150 options.<sup>6</sup> The Exchange

states that ROTs would not be assessed payment for order flow fees for the specified time period in those options, because the Exchange proposes to charge the fee and then credit the same amount. If a specialist unit who has elected to participate in the November Program requests reimbursement for payment for order flow funds expended in connection with any options ranked greater than the top 150 options, the Exchange itself would fund and distribute for this time period to the requesting specialist units the amount that otherwise should have been collected from ROTs.

#### Background

Pursuant to the November Program, the Exchange will assess a payment for order flow fee of \$0.40 on all equity options, except: (1) Options on the iShares FTSE/Xinhua China 25 Index Fund ("FXI Options"),<sup>7</sup> an exchange-traded fund, which will not be assessed an equity options payment for order flow fee; and (2) options on the Nasdaq-100 Index Tracking Stock<sup>SM</sup> traded under the symbol QQQ,<sup>8</sup> which will continue to be assessed \$1.00 per contract. In addition, pursuant to the November Program, any excess payment for order flow funds billed but not requested to be used for reimbursement by the options specialist unit<sup>9</sup> will be rebated to the ROTs, which will appear as a credit on the same payment for order flow invoice that reflects the

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.)

<sup>7</sup> On October 19, 2004, the Exchange began listing FXI Options, a product that is an equity option, but which is assessed fees pursuant to the Exchange's Summary of Index Option and FXI Options Charges. See SR-Phlx-2004-67.

<sup>8</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>9</sup> The Exchange uses the terms "specialist" and "specialist unit" interchangeably herein.

payment for order flow fees to be assessed for that month.<sup>10</sup>

#### Proposal

The Exchange proposes to amend the November Program in one respect—to credit ROTs for payment for order flow fees assessed for trades settling November 1, 2004 through November 12, 2004 in options ranked greater than the top 150 options.<sup>11</sup> The Exchange states that this change is intended to allow ROTs additional time to close out existing positions in options ranked greater than the top 150 options in the event that a ROT no longer wishes to trade an option that becomes subject to the payment for order flow fee under the November Program. The Exchange believes that, going forward, some ROTs may wish to trade in a trading crowd where the specialist unit has elected not to participate in the Exchange's payment for order flow program. Nevertheless, a ROT may have an existing position in that option (for instance, own or be short calls or puts), and the Exchange has determined that it would be appropriate in such cases to provide additional time for ROTs to close those positions before the November Program takes full effect.

If a specialist unit who has elected to participate in the November Program<sup>12</sup>

<sup>10</sup> The payment for order flow fee is 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 in connection with any transactions to which they were a party. See SR-Phlx-2004-68 for additional information regarding the Exchange's November Program.

<sup>11</sup> The Exchange will note on its fee schedule that ROTs will be billed and credited payment for order flow fees (on the same invoice) for the period November 1, 2004 through November 12, 2004 for transactions in equity options ranked greater than the top 150 options and in which the specialist unit has elected to participate in the Exchange's November Program. The Exchange will delete the reference to this "credit" from its fee schedule after the specified time period has expired pursuant to this proposed rule change.

<sup>12</sup> Specialist units 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. 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. Payment for order flow charges will apply to ROTs as long as the specialist unit for that option has elected to participate in the Exchange's payment for order flow program. Once a specialist unit has either elected to participate or not to participate in the Exchange's payment for order flow program in a particular month, it is not required to notify the Exchange in a subsequent month if it does not intend to change its participation status. See Securities Exchange Act Release Nos. 50471 (September 29, 2004), 69 FR 59636 (October 5, 2004) (SR-Phlx-2004-60) and 50572 (October 20, 2004), 69 FR 62735 (October 27, 2004) (SR-Phlx-2004-61) and SR-Phlx-2004-68.

<sup>10</sup> 17 CFR 200.30-3(a)(12).

<sup>11</sup> 15 U.S.C. 78s(b)(1).

<sup>12</sup> 17 CFR 240.19b-4.

<sup>13</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>14</sup> 17 CFR 240.19b-4(f)(2).

<sup>15</sup> See SR-Phlx-2004-68 (October 29, 2004).

<sup>16</sup> The top 150 options are 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