

Federal Register on May 5, 2003.⁸ The Commission received one comment on the proposal.⁹

On May 30, 2003, Phlx submitted Amendment No. 3 to the proposed rule change.¹⁰ Amendment No. 3 replaces Amendments No. 1 and 2 in their entirety.¹¹ This order approves the proposed rule change, and grants accelerated approval to Amendment No. 3. The Commission also solicits comment from interested persons on Amendment No. 3.

Pursuant to the Original Filing, Phlx proposed to charge Exchange members for orders for the principal account of market makers sent to the Exchange through the Linkage from the floor of another exchange ("P Orders") \$.35 per contract executed. In the Original Filing, Phlx stated that its proposed linkage fees were consistent with other fees charged by the Exchange for non-Linkage orders. In Amendment No. 2, Phlx explained that it had amended its fee schedule on April 11, 2003 to modify the fees applicable to broker/dealers for non-AUTO-X trades.¹² Previously, such fee was \$.35 per contract. Now, the fee ranges from \$.35 per contract to \$.20 per contract, depending on the number of contracts.¹³ In Amendment No. 2, Phlx clarified that due to this recent change, the proposed Linkage fee for P Orders would no longer be consistent with other fees charged by the Exchange for non-Linkage orders.

In the ISE Comment Letter, ISE argued that by charging more for Linkage access than for access through regular order-routing systems, the Phlx would be imposing inappropriate barriers to members of other exchanges.¹⁴ ISE also explained that the general consensus and understanding of the parties to the plan implementing the Linkage was that Linkage fees would be no greater than fees charged to professional traders

outside of Linkage and that the other four exchanges have proposed, and the Commission has approved, such limited fees for the other options exchanges.¹⁵ ISE further argued, "Phlx is the only exchange proposing to discourage use of the Linkage through its fee schedule. This will require members on the other exchanges to pay a premium for access to the efficiencies of Linkage," and would "result in 'unfair discrimination' on broker-dealer access."

In Amendment No. 3, Phlx proposes to amend its fee schedule to provide that P Orders would be subject to the same fees as non-Linkage non-AUTO-X broker-dealer orders. Therefore, the proposed fee for P Orders ranges from \$.35 per contract to \$.20 per contract, depending on the number of contracts.¹⁶ Phlx proposes that the fees applicable to P Orders would be implemented as a pilot, expiring on January 31, 2004.

The Commission finds that the proposed rule change, as amended by Amendment No. 3, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange¹⁷ and, in particular, the requirements of Section 6 of the Act.¹⁸ The Commission finds that the proposed rule change, as amended by Amendment No. 3, is consistent with Section 6(b)(4) of the Act,¹⁹ which requires that the rules of an exchange provide equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Commission believes the pilot will give the Exchange and the Commission the opportunity to evaluate whether these fees are appropriate.

The Commission finds good cause, consistent with Section 19(b)(2) of the Act,²⁰ to approve Amendment No. 3 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission notes that the issues addressed in the comment letter received in response to

Amendment No. 2 related to Phlx's proposal to charge higher fees for Linkage orders than for non-Linkage orders. In Amendment No. 3, Phlx revises its proposal to provide for fees for Linkage orders that would be consistent with fees for non-Linkage orders. Accordingly, the Commission believes good cause exists, pursuant to Sections 6(b)(5) and 19(b) of the Act²¹ to accelerate approval of Amendment No. 3 to the proposed rule change.

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 3, including whether it is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of 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-2003-16 and should be submitted by June 27, 2003.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²² that the proposed rule change (SR-Phlx-2003-16), as amended, is approved on a pilot basis until January 31, 2004, and Amendment No. 3 is also approved on an accelerated basis until January 31, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²³

Margaret H. McFarland,
Deputy Secretary.

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ACTION: Notice and request for comments.

²¹ 15 U.S.C. 78f(b)(5) and 15 U.S.C. 78s(b).

²² 15 U.S.C. 78s(b)(2).

²³ 17 CFR 200.30-3(a)(12).

⁸ See Securities Exchange Act Release No. 47750 (April 28, 2003), 68 FR 23789.

⁹ See letter from Michael J. Simon, Senior Vice President and Secretary, International Securities Exchange, to Jonathan G. Katz, Secretary, Commission, dated May 27, 2003 ("ISE Comment Letter").

¹⁰ See letter from Richard S. Rudolph, Director and Counsel, Phlx to Jennifer Lewis, Attorney, Division, Commission, dated May 29, 2003.

¹¹ Telephone call between Richard S. Rudolph, Director and Counsel, Phlx, and Jennifer Lewis, Special Counsel, Division, Commission, on May 30, 2003.

¹² See Securities Exchange Act Release No. 47715 (April 23, 2003), 68 FR 22446 (April 28, 2003).

¹³ The fee is \$.35 per contract for up to 2,000 contracts, \$.25 per contract for between 2,001 and 3,000 contracts; and \$.20 per contract above 3,001 contracts (with the first 3,000 contracts charged \$.25 per contract).

¹⁴ See ISE Comment Letter, *supra* note 9.

¹⁵ See Securities Exchange Act Release Nos. 47719 (April 23, 2003), 68 FR 22764 (April 29, 2003) (File No. SR-ISE-2003-11); 47822 (May 9, 2003), 68 FR 27115 (May 19, 2003) (File No. SR-Amex-2003-14); 47761 (April 29, 2003), 68 FR 24042 (May 6, 2003) (File No. SR-CBOE-2003-11); and 47786 (May 2, 2003), 68 FR 24779 (May 8, 2003) (File No. SR-PCX-2003-08).

¹⁶ See *supra*, note 13.

¹⁷ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁸ 15 U.S.C. 78f.

¹⁹ 15 U.S.C. 78f(b)(4).

²⁰ 15 U.S.C. 78s(b)(2).