

exception to the ITS Plan's trade-through rule.

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the regulations thereunder applicable to a national securities exchange.⁶ Specifically, the Commission believes that the proposal is consistent with section 6(b)(5) of the Act,⁷ which requires that the rules of an exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with person engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market, and to protect investors and the public interest.

The Commission also finds good cause to approve the proposed rule change before the 30th day after the date of publication of notice in the **Federal Register**. The Commission believes that the proposed change to PCXE rule 7.37 is consistent with the terms and spirit of the *de minimis* exemption from the trade-through restrictions of the ITS Plan, and will allow market participants to further benefit from this exemption. The Commission believes that the proposed IOC Cross and PNP Cross order types will promote an efficient and effective market operation and will offer investors additional choices in the handling of their orders. Accelerated approval of the proposal will make the proposed order types available to investors more quickly and without undue delay. Accordingly, the Commission finds it appropriate to approve the proposed rule change before the 30th day after the date of publication in the **Federal Register**.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,⁸ that the proposed rule change (SR-PCX-2002-74) is hereby approved and shall become effective immediately.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁹

Margaret H. McFarland,

Deputy Secretary.

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⁶ In approving this rule, the Commission notes that it has considered the proposal's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁷ 15 U.S.C. 78f(b)(5).

⁸ 15 U.S.C. 78s(b)(2).

⁹ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47166; File No. SR-Phlx-2002-61]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Philadelphia Stock Exchange, Inc. To Amend Options Floor Procedure Advice A-13 To Include Violations for Failure To Obtain Approval To Disengage the NBBO Feature in the Exchange's Minor Rule Plan

January 10, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 4, 2002, 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. On November 7, 2002, the Exchange submitted Amendment No. 1 to the proposed rule change.³ 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

Phlx proposes to amend Phlx Option Floor Procedure Advice ("OFPA") A-13, Auto Execution Engagement/Disengagement Responsibility, to include violations for failure to obtain the necessary approvals prior to disengagement of the Exchange's NBBO Step-Up Feature. The text of the proposed rule change is set forth below. Proposed new text is italicized; deleted language is in brackets.

A-13 Auto Execution Engagement/Disengagement Responsibility (EQUITY OPTION AND INDEX OPTION ONLY)

(a) It is the responsibility of the option Specialist to engage the Auto Execution (Auto-X) system for an assigned option within three (3) minutes of completing the opening or reopening rotation of that option.

Where extraordinary circumstances occur, a Specialist may be provided an

exemption from receiving orders through Auto-X and may then disengage the system upon approval by two Floor Officials. Five minutes subsequent to the disengagement of AUTO-X for extraordinary circumstances (and every 15 minutes thereafter as long as AUTO-X is disengaged), the requesting Specialist [of] or his/her designee, two Floor Officials, and a designated surveillance staff person, shall re-evaluate the circumstances to determine if the extraordinary circumstances still exist. AUTO-X will be re-engaged with either: (i) Specialist [of] or his/her designee determines that the conditions supporting the extraordinary circumstances no longer exist, at which time the Specialist or his/her designee shall inform the Market Surveillance staff that the extraordinary circumstances no longer exist and that the Specialist is re-engaging AUTO-X; or (ii) when two Floor Officials and the designated surveillance staff person determine that the conditions supporting the extraordinary circumstances no longer exist. In the event extraordinary circumstances exist floor-wide, two Exchange Floor Officials and the Chairperson of the Options Committee or his/her designee may determine to disengage the AUTO-X feature floor-wide. Five minutes subsequent to a floor-wide disengagement of AUTO-X for extraordinary circumstances (and every 15 minutes thereafter as long as AUTO-X is disengaged), two Floor Officials, the Chairperson of the Options Committee or his/her designee and a designated Market Surveillance staff person shall re-evaluate the circumstances to determine if the extraordinary circumstances still exist. AUTO-X will be re-engaged when either[;]: (1) the Specialist determines that the conditions supporting the extraordinary circumstances no longer exist for their particular class of options at which time the Specialist or his/her designee will inform Market Surveillance staff that the extraordinary circumstances no longer exist for their particular class of options and that the Specialist is re-engaging AUTO-X; or (2) when two Floor Officials, the Chairperson of the Options Committee or his/her designee and the designated Market Surveillance staff person determine that the extraordinary circumstances no longer exist. The NBBO feature is always disengaged when AUTO-X is disengaged.

Extraordinary circumstances include market occurrences and system malfunctions that impact a Specialist's ability to accurately price and

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Rick Rudolph, Director and Counsel, Phlx, to Jennifer Lewis, Commission, dated November 6, 2002 ("Amendment No. 1"). In Amendment No. 1, Phlx fixed nonsubstantive typographical errors in its rule text, and added a cross-reference to Phlx Rule 960.2 in the purpose section of its proposal.

disseminate option quotations in a timely manner. Such occurrences include fast market conditions such as volatility, order imbalances, volume surges or significant price variances in the underlying security; internal system malfunctions including the Exchange's Auto-Quote system; or malfunctions of external systems such as a specialized quote feed, or delays in the dissemination of quotes from the Option Price Reporting Authority; or other similar occurrences.

The Exchange shall document any action taken to disengage AUTO-X pursuant to this Rule 1080(e), and shall notify all AUTOM Users of each instance in which AUTO-X is disengaged due to extraordinary circumstances. Such documentation shall include: identification of the option(s) affected by such action (except in a case of floor-wide disengagement); the date and time such action was taken and concluded; identification of the Floor Officials who approved such action; the reasons for which such action was taken; identification of the Specialist and the Specialist Unit (or in the case of floor-wide disengagement, identification of the Options Committee Chairperson or his/her designee); and identification of the Market Surveillance staff person monitoring the situation. The Exchange will maintain these documents pursuant to the record retention requirement of the Securities Exchange Act of 1934 and the rules and regulations thereunder.

(b) *AUTO-X on the NBBO.* AUTO-X on the NBBO (the "NBBO Feature") is a feature of AUTOM that automatically executes at the National Best Bid or Offer ("NBBO"). The NBBO Feature will execute AUTO-X eligible orders at the NBBO for certain options designated by the Options Committee as eligible for the NBBO Feature ("automatic step-up options"), provided that the NBBO does not differ from the specialist's best bid or offer by more than the "step-up parameter."

(i) The "step-up parameter" for automatic step-up options shall be the minimum trading increment for options in that series established pursuant to Exchange Rule 1034, or any greater amount established by the Options Committee in respect of specified automatic step-up options or series of options.

(ii) The Chairman of the Options Committee or his designee (or if the Chairman of the Options Committee or his designee is unavailable, two Floor Officials) may determine to disengage the NBBO Feature for orders in certain automatic step-up options after notice to AUTOM users in situations in which

the Exchange is experiencing communications or systems problems; fast markets; or delays in the dissemination of quotes because of queues on the Options Price Reporting Authority ("OPRA"), which would likely render such quotes stale. Where the NBBO Feature is disengaged, such orders shall be executed manually in accordance with Exchange rules.

(iii) In respect of automatic step-up options (1) where the specialist's best bid or offer is inferior to the current best bid or offer in another market by more than the step-up parameter; or (2) where the NBBO for one of the series of automatic step-up options is crossed (i.e., 2.10 bid, 2 asked) or locked (i.e., 2 bid, 2 asked); or (3) in respect of equity options other than automatic step-up options where the specialist's best bid or offer is inferior to the current best bid or offer in another market by any amount, such orders shall be executed manually in accordance with Exchange rules. There may be circumstances in which the specialist's best bid or offer is inconsistent with the Exchange's best bid or offer. In such a circumstance, such an order shall be executed manually.

(iv) Where the Chairman of the Options Committee or his designee (or if the Chairman of the Options Committee or his designee is unavailable, two Floor Officials) determines that quotes in options on the Exchange or another market or markets are subject to relief from the firm quote requirement set forth in the SEC Quote Rule, as defined in Exchange Rule 1082(a)(iii) (the "Quote Rule"), customer market orders will receive an automatic execution at the NBBO based on the best bid or offer in markets whose quotes are not subject to relief from the firm quote requirement set forth in the Quote Rule. Such determination may be made by way of notification from another market that its quotes are not firm or are unreliable; administrative message from the Option Price Reporting Authority ("OPRA"); quotes received from another market designated as "not firm" using the appropriate indicator; and/or telephonic or electronic inquiry to, and verification from, another market that its quotes are not firm. AUTOM customers will be duly notified via electronic message from AUTOM that such quotes are excluded from the calculation of NBBO. The Exchange may determine to exclude quotes from its calculation of NBBO on a series-by-series basis or issue-by-issue basis, or may determine to exclude all options quotes from an exchange, where appropriate. The Exchange shall maintain a record of each instance in

which another exchange's quotes are excluded from the Exchange's calculation of NBBO, and shall notify such other exchange that its quotes have been so excluded. Such documentation shall include: identification of the option(s) affected by such action; the date and time such action was taken and concluded; identification of the other exchange(s) whose quotes were excluded from the Exchange's calculation of NBBO; identification of the Chairman of the Options Committee, his designee, or two Floor Officials (as applicable) who approved such action; the reasons for which such action was taken; and identification of the specialist and the specialist unit. The Exchange will maintain these documents pursuant to the record retention requirements of the Securities Exchange Act of 1934 and the rule and regulations thereunder.

(v) Where the Chairman of the Options Committee or his designee (or if the Chairman of the Options Committee or his designee is unavailable, two Floor Officials), determines that quotes in options on the Exchange or another market or markets previously subject to relief from the firm quote requirement set forth in the Quote Rule are no longer subject to such relief, such quotations will be included in the calculation of NBBO for such options. Such determination may be made by way of notification from another market that its quotes are firm; administrative message from the Option Price Reporting Authority ("OPRA"); and/or telephonic or electronic inquiry to, and verification from, another market that its quotes are firm. AUTOM customers will be duly notified via electronic message from AUTOM that such quotes are again included in the calculation of NBBO.

Fine Schedule (Implemented on a one-year running basis).

- (a) Failure to engage Auto-X:
- | | |
|-------------------------------|---|
| 1st Occurrence | \$500.00 |
| 2nd Occurrence | \$1,000.00 |
| 3rd Occurrence | \$2,000.00 |
| 4th Occurrence and Thereafter | Sanction is discretionary with Business Conduct Committee |
- (b) Failure to receive approval to disengage Auto-X:
- | | |
|-------------------------------|---|
| 1st Occurrence | \$250.00 |
| 2nd Occurrence | \$500.00 |
| 3rd Occurrence | \$1,000.00 |
| 4th Occurrence and Thereafter | Sanction is discretionary with Business Conduct Committee |
- (c) Failure to receive approval to disengage NBBO Feature:
- | | |
|-------------------------------|------------|
| 1st Occurrence | \$250.00 |
| 2nd Occurrence | \$500.00 |
| 3rd Occurrence | \$1,000.00 |
| 4th Occurrence and Thereafter | |

Sanction is discretionary with Business Conduct Committee

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 Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The purpose of the proposed rule change is to amend OFPA A-13 to include in the Exchange's minor rule violation enforcement and reporting plan ("Minor Rule Plan")⁴ violations for failure to receive approval to disengage the National Best Bid/Best Offer ("NBBO") Feature of the Exchange's Automated Options Market System ("AUTOM").⁵ The NBBO Feature automatically executes orders at the NBBO for certain options designated by the Phlx's Options Committee as eligible for the NBBO Feature ("automatic step-up options"), provided that the NBBO does not differ from the specialist's bid or offer by more than the "step up parameter."⁶ Currently, engagement and disengagement of the NBBO Feature

⁴ The Exchange's Minor Rule Plan, codified in Exchange Rule 970, includes Floor Procedure Advises with accompanying fine schedules. Rule 19d-1(c)(2) under the Act authorizes National Securities Exchanges to adopt minor rule violation plans for summary discipline and abbreviated reporting. 17 CFR 240.19d-1(c)(2). Rule 19d-1(c)(2) requires prompt filing with the Commission of any final disciplinary action. However, fines for minor rule violations not exceeding \$2,500 are deemed not final, thereby permitting periodic, as opposed to immediate, reporting.

⁵ AUTOM is the Exchange's electronic order delivery, routing, execution and reporting system, which provides for the automatic entry and routing of equity option and index option orders to the Exchange trading floor. Orders delivered through AUTOM may be executed manually, or certain orders are eligible for AUTOM's automatic execution feature, AUTO-X. Equity option and index option specialists are required by the Exchange to participate in AUTOM and its features and enhancements. Option orders entered by Exchange members into AUTOM are routed to the appropriate specialist unit on the Exchange trading floor.

⁶ For a complete description of the NBBO Feature, see Securities Exchange Act Release No. 43684 (December 6, 2000), 65 FR 78237 (December 14, 2000) (order partially approving SR-Phlx-00-93).

is governed solely by Phlx Rule 1080(c)(i), and violations are referred to the Business Conduct Committee ("BCC").

With regard to the manner in which a specialist must obtain approval to disengage the NBBO Feature, Phlx Rule 1080(c)(i) provides that the Chairman of the Options Committee or his designee (or if the Chairman of the Options Committee or his designee is unavailable, two Floor Officials) may determine to disengage the NBBO Feature for orders in certain automatic step-up options after notice to AUTOM users in certain situations set forth in the Rule. There is, however, no current corresponding OFPA providing a fine schedule for violations of the section of the Rule requiring approval to disengage the NBBO Feature. Thus, violations of Rule 1080(c)(i) currently are investigated by the Exchange's Market Surveillance Department ("Market Surveillance"), and referred by the Exchange's Enforcement Department ("Enforcement") to the BCC.

After receiving a referral from Enforcement, the BCC considers the matter and may determine to issue a statement of charges.⁷ This action is reportable on a member's Form U-4 or member organization's Form BD because it is a disciplinary action. By adopting a fine schedule under the Minor Rule Plan, the Exchange can issue fines for relatively minor infractions without the need for formal disciplinary action.

Accordingly, the Exchange proposes to amend OFPA A-13 to restate from Phlx Rule 1080(c)(i) the conditions for using the NBBO Feature, including the requirement to obtain approval to disengage the NBBO Feature, and to include a fine schedule for failure to obtain such approval. Specifically, the proposed fine schedule is as follows: first occurrence, \$250; second occurrence, \$500; third occurrence, \$1,000; fourth occurrence and thereafter, sanction discretionary with the BCC. The proposed fine schedule would be implemented on a one-year running basis. The BCC also would have discretion concerning sanctions for any violations should they be deemed egregious by Enforcement and referred directly to the BCC pursuant to Exchange Rule 960.2.

The Exchange believes it is appropriate to include in its Minor Rule Plan violations of the approval requirement for disengagement of the NBBO Feature. The Exchange's Minor

⁷ See Phlx Rule 960.3. The BCC could also determine that a less formal sanction, such as a letter of caution, is appropriate.

Rule Plan is designed to provide a prompt response to a violation of Exchange rules when a meaningful sanction is needed, but initiation of a disciplinary proceeding pursuant to Phlx Rule 960.2 is not suitable because such a proceeding would be more costly and time consuming than would be warranted given the nature of the violation.⁸ Therefore, inclusion in the Minor Rule Plan of violations of the NBBO Feature disengagement approval requirement should make the Exchange's disciplinary system more efficient. If the Exchange determines that a violation of Phlx Rule 1080(c)(i) or OFPA A-13, as amended, is not minor in nature, the Exchange may initiate full disciplinary proceedings in accordance with Phlx Rule 960.2.

2. Statutory Basis

The Phlx believes the proposed rule change is consistent with section 6 of the Act,⁹ in general, and with section 6(b)(5) of the Act,¹⁰ in particular, in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system, and to protect investors and the public interest, by including violations of the approval requirement for disengagement of the NBBO Feature in its Minor Rule Plan, thus providing for the more efficient operation of its disciplinary system. In addition, the Exchange believes the proposal is consistent with section 6(b)(6) of the Act,¹¹ which requires that the rules of an exchange provide that its members be appropriately disciplined for violation of exchange rules, the Act, and the rules and regulations thereunder, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

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

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

⁸ Phlx Rule 960.2 governs the initiation of disciplinary proceedings by the Exchange for violations within the disciplinary jurisdiction of the Exchange.

⁹ 15 U.S.C. 78f.

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ 15 U.S.C. 78f(b)(6).

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

Written comments were neither solicited nor 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 Phlx 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. 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-2002-61 and should be submitted by February 12, 2003.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03-1288 Filed 1-21-03; 8:45 am]

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UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of promulgation of temporary, emergency amendments to the sentencing guidelines and commentary.

SUMMARY: The Commission has promulgated two temporary, emergency amendments to the sentencing guidelines as follows: (1) pursuant to sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, and its general authority under 28 U.S.C. 994, the Commission has promulgated amendments to §§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), 2E5.3 (False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act), 2J1.2 (Obstruction of Justice), and 2T4.1 (Tax Table), and Appendix A (Statutory Index); and (2) pursuant to section 314 of the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, and its general authority under 28 U.S.C. 994, the Commission has promulgated a new guideline in chapter two, part C (Offenses Involving Public Officials), and amendments to §§ 3D1.2 (Groups of Closely Related Counts), and 5E1.2 (Fines for Individual Defendants), and Appendix A (Statutory Index). The Commission also has requested public comment, to be submitted to the Commission not later than March 17, 2003, regarding repromulgation of these two temporary, emergency amendments as permanent amendments (see the issue of the **Federal Register** published on January 17, 2003).

DATES: The Commission has specified an effective date of January 25, 2003, for the temporary, emergency amendments set forth in this notice.

ADDRESSES: Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, NE., Suite 2-500, Washington, DC 20002-8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502-4590.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May of each year pursuant to 28 U.S.C. 994(p). The Commission also may promulgate emergency amendments prior to the first day of May if required to do so by specific congressional legislation.

The Commission has promulgated two temporary, emergency guidelines in response to specific congressional legislation. First, in response to the Sarbanes-Oxley Act, the Commission has promulgated an amendment that increases the penalties for corporate fraud and offenses involving the obstruction of justice. Second, in response to the Bipartisan Campaign Reform Act of 2002, the Commission has promulgated an amendment that provides a new guideline and increased penalties for offenses involving a violation of Federal election campaign laws. The Commission has specified an effective date of January 25, 2003, for both amendments.

Additional information pertaining to the amendments described in this notice may be accessed through the Commission's website at www.ussc.gov.

Authority: Sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204; section 314 of the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155; 28 U.S.C. 994(a), (o), (p), (x); USSC rules of practice and procedure, rule 4.4.

Diana E. Murphy,
Chair.

1. Corporate Fraud

Amendment: Section 2B1.1(b)(1) is amended by striking the period; and by adding at the end the following:

“(O) More than \$200,000,000 add 28
(P) More than \$400,000,000 add
30.”

Section 2B1.1 is amended by striking subsection (b)(2) as follows:

“(2) (Apply the greater) If the offense—

(A) (i) involved more than 10, but less than 50, victims; or (ii) was committed through mass-marketing, increase by 2 levels; or

(B) involved 50 or more victims, increase by 4 levels.”,

and inserting the following:

¹² 17 CFR 200.30-3(a)(12).