

offered by at least one other market center to be consistent with the Act.<sup>12</sup>

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

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

#### *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**

Because the foregoing proposed rule change, as amended: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) <sup>13</sup> of the Act and Rule 19b-4(f)(6) thereunder.<sup>14</sup>

Nasdaq has requested that the Commission waive the 30-day operative delay, as specified in Rule 19b-4(f)(6)(iii),<sup>15</sup> and designate the proposed rule change to become operative upon filing with the Commission. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change is similar to order types already in use in the marketplace. Therefore the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>16</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.<sup>17</sup>

### **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-NASD-2005-107 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-NASD-2005-107. 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 NASD. 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-NASD-2005-107 and should be submitted on or before October 13, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>18</sup>

**Jonathan G. Katz,**  
Secretary.

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BILLING CODE 8010-01-P

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 52448; File No. SR-Phlx-2005-25]

### **Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendments No. 1, 2, and 3 Thereto by the Philadelphia Stock Exchange, Inc. Relating to the Adoption of New Rules That Would Establish an Automated Opening System on the Exchange**

September 15, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on April 21, 2005, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change. The Exchange submitted Amendment No. 1,<sup>3</sup> Amendment No. 2,<sup>4</sup> and Amendment No. 3<sup>5</sup> to its proposal on June 1, 2005, September 1, 2005, and September 14, 2005, respectively. The proposed rule change, as amended, is described in Items I, II, and III, below, which Items have been prepared by the Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Phlx proposes to adopt new rules that would establish an automated opening system on the Exchange. The Exchange also proposes to make

<sup>18</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See Form 19b-4, dated June 1, 2005

("Amendment No. 1"). Amendment No. 1 replaced the original filing in its entirety.

<sup>4</sup> See Form 19b-4, dated September 1, 2005 ("Amendment No. 2"). Amendment No. 2 replaced Amendment No. 1 in its entirety.

<sup>5</sup> See Form 19b-4, dated September 14, 2005 ("Amendment No. 3"). In Amendment No. 3, Phlx, in part, deleted proposed rule text to clarify that during a manual opening all market orders are to be executed at one price.

<sup>12</sup> Securities Exchange Act Release No. 47467 (March 7, 2003), 68 FR 12134 (March 13, 2003) (SR-PCX-2002-75).

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

<sup>14</sup> 17 CFR 240.19b-4(f)(6).

<sup>15</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>16</sup> For purposes of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>17</sup> The effective date of the original proposed rule is September 8, 2005. The effective date of Amendment No. 1 is September 14, 2005. For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on September 14, 2005, the date on which Nasdaq submitted Amendment No. 1. See 15 U.S.C. 78s(b)(3)(C).

conforming amendments to various existing rules and Option Floor Procedure Advices ("OFPA's"). The text of the proposed rule change is available on the Exchange's Web site (<http://www.phlx.com>), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

## 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 purpose of the proposed rule change is to increase the number of option orders and transactions handled and executed electronically on the Exchange by establishing a fully automated opening system.

#### Background

In July, 2004, the Exchange began trading options on its new electronic options trading platform, Phlx XL.<sup>6</sup> Because Phlx XL does not currently include an automated opening functionality, specialists are currently required to open option series manually. The proposed rule change would establish a fully automated opening system for options traded on Phlx XL,<sup>7</sup> as part of the Phlx XL system.

#### Pre-Opening

For a period of time before the scheduled opening in the underlying security (and not less than one hour as determined by the Options Committee with notice to the membership via Exchange circular), Phlx XL will accept orders and quotes during the "Pre-Opening Phase." The Phlx XL system will disseminate to specialists,

Streaming Quote Traders ("SQTs"),<sup>8</sup> Remote Streaming Quote Traders ("RSQTs"),<sup>9</sup> and non-SQT ROTs<sup>10</sup> who are required to submit continuous two-sided electronic quotations pursuant to Exchange Rule 1014(b)(ii)(E)<sup>11</sup> (collectively, for purposes of proposed Rule 1017, "Phlx XL participants") information about resting orders on the book that remain from the previous trading session and orders submitted prior to the opening.

The purpose of this provision is to establish that a pre-opening phase must occur each day and to make Exchange members and member organizations aware of the time the Exchange will begin accepting pre-opening orders and quotes.

A further purpose of this provision is to establish by rule that the Exchange will provide information to Phlx XL participants about orders on the limit order book during the pre-opening phase. Such information would include, without limitation, the option symbol, the limit price and the size of the limit order, the terms of the order (*i.e.*, day, good-till-cancelled), buy or sell, call or put, and any other conditions applicable to the limit order.

#### Calculation of Opening Price

The system will calculate an Anticipated Opening Price ("AOP") and Anticipated Opening Size ("AOS") when a quote or trade has been disseminated by the primary market for the underlying security, and under the conditions set forth below. The specialist assigned in the particular option must enter opening quotes not later than one minute following the

dissemination of a quote or trade by the primary market for the underlying security. The purpose of this provision is to ensure that the specialist is able to accurately quote the option overlying the underlying security once such underlying security has opened, and to ensure that the specialist promptly satisfies his or her quoting obligations established under Exchange rules.<sup>12</sup> The specialist may submit opening quotes prior to this time; the proposed rule is intended to establish the time within which the specialist must submit opening quotes and not to preclude the specialist from submitting such quotes prior to that time.

An AOP may only be calculated if: (i) the Exchange has received market orders, or the book is crossed (highest bid is higher than the lowest offer) or locked (highest bid equals the lowest offer); and (ii) either (A) the specialist's quote has been submitted; (B) the quotes of at least two Phlx XL participants that are required to submit continuous, two-sided quotes in 100% of the series in all option issues in which such Phlx XL participant is assigned ("100% participants"),<sup>13</sup> have been submitted within two minutes of the opening trade or quote on the primary market for the underlying security (or such shorter time as determined by the Options Committee and disseminated to the membership via Exchange Circular); or (C) if neither the specialist's quote nor the quotes of two 100% participants have been submitted within two minutes of the opening trade or quote on the primary market for the underlying security (or such shorter time as determined by the Options Committee and disseminated to the membership via Exchange Circular), one 100% participant has submitted their quote.

The purpose of this provision is to ensure that the affected series will open regardless of whether the specialist has submitted a quotation (the specialist may not submit his or her quote due to, for example, system malfunctions), provided that a 100% participant is quoting in the affected series. The

<sup>8</sup> An SQT is an Exchange Registered Options Trader ("ROT") who has received permission from the Exchange to generate and submit option quotations electronically through AUTOM in eligible options to which such SQT is assigned. An SQT may only submit such quotations while such SQT is physically present on the floor of the Exchange. See Exchange Rule 1014(b)(ii)(A).

<sup>9</sup> An RSQT is a ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically through AUTOM in eligible options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange. See Exchange Rule 1014(b)(ii)(B).

<sup>10</sup> A non-SQT ROT is a ROT who is neither an SQT nor an RSQT. See Exchange Rule 1014(b)(ii)(C).

<sup>11</sup> Exchange Rule 1014(b)(ii)(E) requires non-SQT ROTs who transact more than 20% of their contract volume in an option electronically versus in open outcry during a particular calendar quarter to submit proprietary electronic quotations in such an option during the subsequent calendar quarter for a certain number of series in such option, depending on the percent of total volume transacted electronically versus in open outcry on the Exchange in such option.

<sup>12</sup> Exchange Rule 1014(B)(ii)(D) requires specialists to quote continuous, two-sided markets in not less than 100% of the series in each Streaming Quote Option in which such specialist is assigned, and requires an SQT and an RSQT quote continuous, two-sided markets in not less than 60% of the series in each Streaming Quote Option (as defined in Rule 1080(k)) in which such SQT or RSQT is assigned.

<sup>13</sup> An example of a 100% participant is a new category of ROT on the Exchange known as a "Directed SQT" or a "Directed RSQT," defined as an SQT or RSQT that receives a Directed Order. See Securities Exchange Act Release No. 51759 (May 27, 2005), 70 FR 32860 (June 6, 2005) (SR-Phlx-2004-91).

<sup>6</sup> See Securities Exchange Act Release No. 50100 (July 27, 2004), 69 FR 44612 (August 3, 2004) (SR-Phlx-2003-59).

<sup>7</sup> Currently, all equity and index options, and options overlying Exchange Traded Fund Shares ("ETFs") that are listed on the Exchange are traded on Phlx XL.

Exchange believes that when a Phlx XL participant is quoting in 100% of the series in a particular option, the series should be opened as soon as possible regardless of whether the specialist has submitted a quotation.<sup>14</sup> The 100% participant's quotations enable the Exchange to disseminate continuous quotations in each underlying option series, thus ensuring that the Exchange will provide liquid markets in such series once the series has opened.

#### *Opening Order/Quote Imbalance*

In situations where an AOP may be calculated (*i.e.*, when the conditions described above are present) and there is an order/quote imbalance, the system will immediately send an imbalance notice indicating the imbalance side (buy or sell) and the AOP and AOS (an "Imbalance Notice") to Phlx XL participants provided that the primary market for the underlying security has disseminated the opening quote or trade. Phlx XL participants that have not submitted opening quotes will then submit their opening quotes and Phlx XL participants that have submitted opening quotes may submit revised opening quotes,<sup>15</sup> and thereafter the system will disseminate an updated Imbalance Notice every five seconds (or such shorter period as determined by the Options Committee and disseminated to membership via Exchange Circular) until the series is open. If no imbalance exists, no Imbalance Notice will be sent, and the system will establish an opening price as described below.

The system will calculate the AOP and AOS based on quotes, market orders and current resting orders on the limit order book. The Exchange believes that the calculation and dissemination of the AOP and AOS to Phlx XL participants should provide such Phlx XL participants with sufficient information to determine whether or not to submit revised quotations in order to participate in the opening, based on the dynamic movement of the AOS as additional quotes and market orders are received.

#### *Actual Opening Price*

The proposal would establish the opening price of a series in situations

where there is no opening quote/order imbalance. Proposed Rule 1017(c)(i) would define the opening price as the price at which the maximum quantity of contracts will be traded. Because the Exchange believes that an option series should open if at all possible to ensure fair and orderly markets in such series, the proposed rule would establish a series of "tie-breakers" that the system will follow in establishing the opening price when two or more prices would satisfy the maximum quantity criteria. Specifically, when two or more prices would be the price at which the maximum quantity of contracts will be traded, the system will establish the opening price based on the following criteria, in order: (1) The price at which the greatest number of customer orders will be traded; (2) the price at which the maximum number of Phlx XL participants will trade; and, should there continue to be two or more prices that satisfy the maximum quantity criteria, the opening price will be (3) the price that is closest to the closing price from the previous trading session.

The Exchange believes that the third "tie-breaker," specifying that the opening price would be the price at which the greatest number of Phlx XL participants will trade (once it is established that the opening price would be the price at which the maximum quantity of contracts and the greatest number of customer orders will trade) should ensure that the opening price would reflect the actual state of the market, *i.e.*, the price at which more Phlx XL participants are willing to trade.

The Exchange believes that these "tie-breaking" rules should enable the Exchange to open trading expeditiously in a series despite the fact that there may be two or more prices that would result in the maximum quantity of contracts being traded under a variety of scenarios, which the system will account for in automatically determining an opening price.

#### *Priority on Openings*

The system will give priority to market orders first (including a limit order to buy which is at a higher price than the price at which the option is to be opened and a limit order to sell which is at a lower price than the price at which the option is to be opened, which will be treated as market orders), then to resting limit orders at the opening price. The purpose of this provision is to ensure that the maximum number of contracts trade at the opening price. The inclusion of limit orders that are at a better price than the opening price in the pool of market orders

should ensure that all such orders trade at the opening price before limit orders with a limit price that is equal to the opening price.

#### *Contingency, Hedge, and Synthetic Option Orders*

Contingency Orders, Hedge Orders, and Synthetic Option Orders, as defined in Exchange Rule 1066, are not considered in the determination of the opening price, and do not participate in the opening trade because such order types generally include two or more option components, and may also include a stock component.

#### *Floor-Brokered Orders*

To be considered in the determination of the opening price and to participate in the opening trade, orders represented by Floor Brokers must be entered onto the book electronically. The purpose of this provision is to ensure that limit orders represented by Floor Brokers at the opening are captured electronically at the opening price for inclusion in the opening.<sup>16</sup> Otherwise, a limit order held by a Floor Broker in the trading crowd that is not placed onto the limit order book electronically would not be included in the automated opening because such a limit order would not be incorporated into the Phlx XL system.

#### *Inbound Orders and Quotes Received While the System Completes the Opening Trade*

Inbound orders and quotes will not be included in the calculation of the opening price for a brief period established by the system (and thus not within the discretion of any Phlx XL participant) while the system is in the process of completing the opening trade. During such brief period, such inbound orders and quotes will be entered into the Phlx XL system in order of their arrival. The purpose of the brief interval during which such inbound quotes and orders will not be included in the calculation of the opening price is to allow the system to calculate the opening price after the underlying security opens in the primary market using the quotes and orders received up to the time of the brief interval, so that dynamic quotations and orders received while the system is calculating the opening price do not have the effect of

<sup>14</sup> A specialist that fails to submit opening quotes within one minute of the opening on the primary market would be subject to possible disciplinary action.

<sup>15</sup> Telephone conversation between Richard S. Rudolph, Vice President and Counsel, Phlx, and Terri L. Evans, Special Counsel, Division of Market Regulation ("Division"), on September 6, 2005 (clarifying that Phlx XL participants that have previously submitted opening quotes may submit revised quotes).

<sup>16</sup> In January, 2005, the Exchange adopted rules regarding the immediate display of limit orders, requiring Floor Brokers and Registered Options Traders that wish to place limit orders onto the limit order book to do so electronically. See Securities Exchange Act Release No. 51064 (January 21, 2005), 70 FR 4180 (January 28, 2005) (SR-Phlx-2004-73). See also, Exchange Rules 1080, Commentary .02; 1014, Commentary .18; and 1063, Commentary .01.

continually changing the calculated opening price. If there were no such brief interval, it is possible that such dynamic quotes and orders, if not excluded, could cause the series never to open because the system could continue to calculate the opening price indefinitely.

Proposed Rule 1017(d) would provide that, as the opening price is determined by series, the system will disseminate through OPRA the opening trade price, if any, and then the quote after the series is open. The system will process and open the series for a given option in random order. If there are no orders in a particular series when the underlying security opens, the Exchange will disseminate quotations at the best bid and offer in such series submitted by Phlx XL participants assigned in the particular option.

#### *Situations in Which the Option Series Will Not Open*

The proposed rule would set forth three conditions under which the system will not open a series.

First, the system will not open a series when there is no quote from the specialist or a 100% participant. The purpose of this provision is to ensure that a series will not open if there is no Phlx XL participant that is providing continuous, two-sided quotations in a particular series.

Second, the system will not open a series when the opening price is not within an acceptable range (as determined by the Options Committee and announced to Exchange members and member organizations by way of Exchange Circular) compared to the highest offer and the lowest bid (e.g., the upper boundary of the acceptable range may be 125% of the highest quote offer and the lower boundary may be 75% of the lowest quote bid). This is to provide a limitation on the range of the opening price in an option so that it is reasonably aligned with the opening price in the underlying security, and so that the opening price does not fall significantly outside of the bids/offers entered during the pre-opening phase. The Exchange proposes a similar conforming amendment to Commentary .15 to Exchange Rule 1014.

Third, the system will not open a series when the opening trade would leave a market order imbalance (i.e., there are more market orders to buy or to sell for the particular series than can be satisfied by the limit orders, market orders and quotes on the other side of the market). This is to ensure that no market orders that would be eligible for execution at the opening price would be

left unexecuted, while other market orders receive executions.

#### *No Specialist or 100% Participant Quote or Quote Outside Acceptable Range*

If the specialist or a Phlx XL participant with a 100% quoting requirement is not quoting as described in proposed Rule 1017(e)(i), or if the opening price is not within an acceptable range as described in proposed Rule 1017(e)(ii), proposed Rule 1017(f) would provide that two Floor Officials may authorize the manual opening of the affected series where necessary to ensure a fair and orderly market. In such a circumstance, the Exchange's existing rules concerning manual openings would apply.<sup>17</sup>

#### *Manual Opening by Specialist*

Proposed Rule 1017(g)(i) would provide that if a condition or the absence of a required condition not otherwise covered by the proposed rule would prevent an opening trade to occur, the specialist may, with prior notification to Market Surveillance staff, determine to open a series manually in the interest of a fair and orderly market, subject to the approval of two Floor Officials within five minutes of the opening of the affected series. Manual openings would be required to be conducted in accordance with current Commentary .01–.03 of Exchange Rule 1017.

A further purpose of this provision is to enable the specialist to conduct a manual opening in a timely fashion without undertaking the time-consuming burden of seeking out two Floor Officials prior to such manual opening. If the specialist were required to do so, it is highly likely that the time required to seek approval of two Floor Officials would unduly delay such a manual opening. The Exchange believes that the required prior notification to Market Surveillance staff, coupled with the requirement to obtain the approval of two Floor Officials within five minutes of the opening of the affected series, provides the Exchange with sufficient regulatory oversight to monitor such activity. A specialist would be subject to disciplinary action if it is determined that the specialist violated the rule.

As a housekeeping matter, to conform the existing rule to current Exchange definitions, Commentary .03 to Exchange Rule 1017 would be amended to provide that Contingency Orders, Hedge Orders, and Synthetic Option

Orders, as defined in Exchange Rule 1066 do not participate in opening rotations or in the determination of an opening price.

#### *Index Options*

Respecting options overlying an index, the proposal would permit the specialist to engage the automated opening system to open such options when at least 50% of the current index value of all the securities underlying the index have opened for trading on the primary market. This is consistent with current Exchange rules concerning the manual opening and re-opening of Industry Index options (as defined below).<sup>18</sup>

The Exchange notes that current Exchange Rule 1047A and OFPA G–2, respecting the opening of index options, distinguish between an Industry Index,<sup>19</sup> which as stated above, may be opened when at least 50% of the current index value of all the securities underlying the index have opened for trading on the primary market, and which must currently be opened when at least 90% of the current index value of all the securities underlying the index have opened for trading on the primary market; and a Market Index<sup>20</sup> by requiring the opening rotation for Market Index options to be held at or as soon as practicable after the opening of business on the Exchange, with no similar requirements as to the percentage of the current index value of all the securities underlying the index which must be opened for the option overlying such index to open. The proposal would apply this distinction respecting manual openings only, whereas the system will not make a distinction between an Industry Index option and a Market Index option in determining to open such an option automatically based on the percentage of the current index value of all the securities underlying the index that must be opened.

Under the proposal, with respect to automated openings in an Industry or Market Index conducted pursuant to Rule 1017, the specialist may engage the automated opening system to open such options when underlying securities representing 50% of the current index value of all the securities underlying the index have opened for trading on the

<sup>18</sup> See Exchange Rule 1047A(a)(i) and OFPA G–2.

<sup>19</sup> An Industry Index is defined as an index designed to be representative of price movements in particular categories of stocks. See Exchange Rule 1000A(b)(11).

<sup>20</sup> A Market Index is an index designed to be representative of general price movements in the stock market. *Id.*

<sup>17</sup> See, e.g., the Commentary to Rule 1017, Rules 1047, 1047A, and OFPAs A–12, A–14 and G–2.

primary market. The Exchange proposes to amend Rule 1047A and OFPA G-2 to require the opening of an Industry Index when 100% of the current index value of all the securities underlying the index have opened for trading on the primary market. The system thus will automatically open all index options when underlying securities representing 100% of the current index value of all the securities underlying the index have opened for trading on the primary market.

Therefore, when at least 50% of the current index value of all the securities underlying an index have opened for trading on the primary market, the specialist may determine to engage the automated opening system to open it for trading; when 100% of the current index value of all the securities underlying an index have opened for trading on the primary market, the system will automatically open it for trading.

#### *Reopening Following a Trading Halt*

The procedure described in the proposed Rule may be used to reopen an option after a trading halt.

#### *Conforming Amendments to Current Exchange Rules and OFPAs*

The Exchange proposes to delete Commentary .03(d)(iii) from Exchange Rule 1017, which currently states that the specialist will not open a series when there is a market on opening order with no corresponding order. The Exchange currently does not accept market on opening orders and thus Commentary .03(d)(iii) is unnecessary.

In addition to the proposed amendments to Exchange Rule 1017, the Exchange is proposing various conforming amendments to current Exchange rules and OFPAs that relate to openings and re-openings following a trading halt.

The Exchange proposes to amend Exchange Rule 1047, Trading Rotations, Halts and Suspensions, to reflect an automated opening conducted pursuant to Exchange Rule 1017 shall be considered a "trading rotation" for purposes of these rules. Thus, any requirement to conduct a rotation under the rule could be fulfilled by initiating an automated opening or re-opening by the system.

Exchange Rule 1047(c) would be amended to reflect that two Floor Officials (with the concurrence of a Market Surveillance officer (and not the appropriate Floor Standing Committee as reflected in the current rule) would have the authority, respecting a particular class or series of options, to delay the opening, to halt and reopen

after a halt, to open where the underlying stock or ETF has not opened. The Exchange believes that it is more expedient and less cumbersome for two Floor Officials to make such decisions, rather than convening the full Committee to make such a decision.

Exchange Rule 1047 would be further amended to delete all references to the Series Opening Request Ticket ("SORT") Procedure,<sup>21</sup> an obsolete procedure that is no longer in use on the Exchange. The Exchange proposes a similar amendment to OFPA A-12 Opening Rotations and SORT Procedures.

Commentary .02 to Exchange Rule 1047 would be amended to require the specialist to inform the Market Surveillance staff in the event that trading in an underlying stock or Exchange-Traded Fund Share has not opened in the primary market for such stock or Exchange-Traded Fund Share within a reasonable time after the opening of business, or, in the event that current quotations for any underlying foreign currency are for any reason unavailable. The purpose of this proposed amendment is to clarify that the Market Surveillance staff would then take the appropriate steps to determine the cause of such delay or unavailability, rather than the chairman of the appropriate Floor Standing Committee or his delegate on the floor, as the rule currently provides. The Exchange believes that it is more practical and efficient for the specialist to report any such delay or unavailability to the Market Surveillance staff, who are located on the floor and are readily available to the specialist in such circumstances.

The Exchange also proposes to amend Exchange Rule 1047A, Trading Rotations, Halts or Reopenings, which governs index options. As described above, one substantive change involves the current requirement to open an Industry Index option when underlying securities representing 90% of the current index value of all the securities underlying the index have opened for trading on the primary market. The Exchange proposes to amend this provision to require the opening of an

index when 100% of the current index value of all the securities underlying the index have opened for trading on the primary market. The purpose of this proposal is to eliminate any uncertainty as to what the underlying index value would be once the remaining 10% of the underlying index value has opened on the primary market, thus enabling the specialist to price the option overlying the index accurately and with a reasonable degree of certainty.

For clarity, the sentence providing that it is the responsibility of the specialist to arrange the price at which an option series opens and re-opens on the Exchange would be deleted, as this provision is currently found and will be retained in Commentary .03 to Exchange Rule 1017 concerning manual openings, and the system, not the specialist, would establish the opening price in an automated opening.

For consistency, OFPA A-12 would be amended to establish that the acceptable range within which the opening price must be established, would apply to both automated openings and manual openings conducted pursuant to Exchange Rule 1017 and the Commentary thereto. A similar amendment is proposed respecting OFPA A-14, Equity Option and Index Option Opening Parameters.

OFPA G-2, Trading Rotations, Halts or Reopenings, would be amended to reflect that an Industry Index option must open once the underlying securities representing 100% (a proposed increase from 90%) of the current index value of all the securities underlying the index have opened for trading on the primary market, and that respecting automated openings the system will automatically open an index when 100% of the current index value of all the securities underlying the index have opened for trading on the primary market. The OFPA would continue to provide that the specialist in an Industry Index option may conduct a manual opening rotation or may engage the system for an automated opening in such option when 50% of the current index value of all the securities underlying the index have opened for trading on the primary market (either by way of a manual rotation or by engaging the system). The Exchange also proposes to delete references to Super Cap Index options from OFPA G-2, because the Exchange no longer lists this product.

Exchange Rules 1047 and 1047A, and OFPAs A-12 and G-2 would be amended to include the provision that an automated opening conducted pursuant to Exchange Rule 1017 would be considered a "rotation" for purposes

<sup>21</sup> A SORT opening, which is no longer implemented on the Exchange, was one where the specialist opened all series in an options class simultaneously after rotating only those series for which a SORT was received. The SORT is a form that was submitted by a member with interest in a particular series to the specialist, at least five minutes prior to the opening of trading, and signaled the specialist to rotate that series. Prior to conducting a SORT procedure, the specialist would announce to the crowd that such a procedure was to be utilized, and in which series, if any, a SORT had been received.

of the rules and OFPAs. Finally, these rules would also be amended to include the term "Market Surveillance officer" to conform to the current Exchange staff structure.

#### *Deployment of the Automated Opening System*

The Exchange will deploy the automated opening system on an issue-by-issue basis. The Exchange anticipates that at least 10 issues will be deployed on the system within four weeks from the date of approval of the rules relating to the system by the Commission, and that the system will be deployed for all options traded on the Exchange within twelve weeks of such approval.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>22</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>23</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and the national market system, and, in general, to protect investors and the public interest, by establishing rules for an automated opening system, thereby increasing the number of option orders handled electronically on the Exchange.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>24</sup>

#### *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 Exchange 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-2005-25 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-Phlx-2005-25. 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-2005-25 and should be submitted on or before October 13, 2005.

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

**Jonathan G. Katz,**  
*Secretary.*

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#### **SMALL BUSINESS ADMINISTRATION**

##### **Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest**

Notice is hereby given that Harbert Mezzanine Partners SBIC II, L.P. ("Applicant"), One Riverchase Parkway South, Birmingham, AL 35244, an SBIC Applicant under the Small Business Investment Act of 1958, as amended ("the Act"), in connection with the financing of a small concern, has sought an exemption under section 312 of the Act and section 107.730, Financials which Constitute Conflicts of Interest, of the Small Business Administration ("SBA") rules and regulations (13 CFR 107.730 (2004)). Harbert Mezzanine Partners SBIC II, L.P. proposes to provide financing in the form of subordinated debt and Series B convertible preferred stock to Optical Experts Manufacturing, Inc. ("OEM"), 8500 Tyron Street, Charlotte, NC 28273. The proceeds will be used to finance the recapitalization of OEM.

This investment requires an exemption from the prohibitions in 13 CFR 107.730, Conflicts of Interest, because OEM is an Associate of the Applicant by virtue of the greater than 10 percent ownership interest held by Harbinger Mezzanine Partners, L.P. ("Harbinger").

Notice is hereby given that any interested person may submit written comments on the transaction to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

**Jaime Guzman-Fournier,**

*Associate Administrator for Investment.*

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#### **SMALL BUSINESS ADMINISTRATION**

##### **Audit and Financial Management Advisory (AFMAC)**

##### **Committee Meeting**

The U.S. Small Business Administration's Audit and Financial

<sup>22</sup> 15 U.S.C. 78f(b).

<sup>23</sup> 15 U.S.C. 78f(b)(5).

<sup>24</sup> Telephone conversation between Richard S. Rudolph, Vice President and Counsel, Phlx, and Terri L. Evans, Special Counsel, Division, Commission on September 14, 2005 (clarifying Phlx's statement on burden on competition).

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