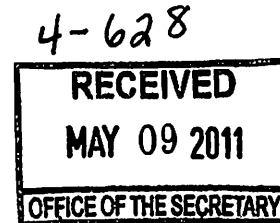


PENNMONT SECURITIES

83 E. LANCASTER AVE. • PAOLI, PA 19301 • (610) 644-3936

April 29, 2011

Secretary of the SEC
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549



Attention: Secretary to the Commission

Re: Petition under Rule 553(e) and 17 CFR § 201.192(a)

Gentlemen:

Please accept this as a petition filed under the authority granted by the rule and regulation noted above.

We intend, by submitting this petition, to request the Commission to amend Rule 651 of the Philadelphia Stock Exchange (PHLX), or to direct PHLX to do so, and contains our reasons for the request. As you know, PHLX is now known as NASDAQ OMX PHLX as a result of various transactions, but Rule 651 is still in effect.

Our interest in this matter relates to our status as members and shareholders of PHLX at relevant times, and also as persons who have been adversely impacted by the application by PHLX of Rule 651 relating to our status as suspended PHLX members. Our reasons for seeking the changes we suggest in this petition pertain to our desire to have the role of a Self-Regulatory Organization in a Rule 651-type situation clarified and brought into line with standard practice, commercial reasonableness and the expectations and rights of shareholders and exchange members alike. This affects us also because it is our business model to be a participant in the ownership of an exchange on which we are members so that we can have a voice in its management.

Rule 651 states:

Exchange's Costs of Defending Legal Proceedings

Any member, member organization, foreign currency options participant, foreign currency options participant organization, or person associated with any of the foregoing who fails to prevail in a lawsuit or other legal proceeding instituted by such person or entity against the Exchange or any of its board members, officers, committee members, employees, or agents, and related to the business of the Exchange, shall pay to the Exchange all reasonable expenses, including attorneys' fees, incurred by the Exchange in the defense of such proceeding, but only in the event that such expenses exceed \$50,000.00. This provision shall not apply to disciplinary actions by the Exchange, to administrative appeals of Exchange actions or in any specific instance where the Board has granted a waiver of this provision.

The specific reasons why we believe that the Rule should be amended are:

1. The Rule, or a related definitional section, should clearly define the term “the business of the exchange” as it is both undefined and a critical limiting factor in Rule 651. There should be certainty as to what matters the Rule reaches and which it does not. The Rule now uses the vague term “related to the business of the exchange” to set what matters the Rule can reach.

The Commission itself has already clearly identified the issue. In the Matter of Richard B. Feinberg, Admin. Proc. File No. 3-13128, states that the Commission’s release approving Rule 651 “does not expressly address the scope of the phrase ‘related to the business of the Exchange.’” The Commission went on in Feinberg to state that the phrase had broad wording and that it must have limits. The term is too undefined to act as a limitation.

The Feinberg case was about the use of Rule 651 against him for not prevailing in a civil action in which he prosecuted his private right of action for insider trading against a party who happened to be on the PHLX Board of Governors. The Commission concluded that PHLX had overreached in applying Rule 651 because insider trading was not related to the “business of the exchange,” even though that information was acquired by way of the defendant being on the PHLX Board of Governors.

Other exchanges have similar rules which were enacted before Rule 651. All previously enacted rules were rules enacted by not-for-profit exchanges which have a different business organization (“the business of the exchange”) than a for-profit exchange. Rule 651, intentionally or not, does not take into account that PHLX was for-profit when using the term “related to the business of the exchange.” That term can mean different things depending upon the corporate structure. Moreover, the rules of other exchanges had other boundaries set as part of their enactment including the recognition that federal securities law claims and fiduciary claims under Delaware corporate law could be brought. PHLX in enacting Rule 651 cited the rules of CHX, CBOE, PSE and the AMEX rule. A copy of the relevant enacting language from those exchanges is attached with highlighting showing the related terms. These attachments demonstrate how the Rule 651 problem arose and also how it can be remedied. It is clear from the formal rulemaking of the CHX and CBOE rules that those rules were enacted in connection with rule enactments setting the boundaries for individual liability in connection with the performance of official duties that specifically did not shield individuals from claims brought for violations of the federal securities laws for which a private right of action had been given, and preserved the right to proceed under Delaware state law for matters of corporate governance. By extension it would appear that those types of lawsuits do not relate to the “business of the exchange.”

The Commission in Feinberg stated that Rule 651 was designated “effective upon filing” by the SEC because PHLX represented that the rule was “consistent with existing rules” of other exchanges. As an effective upon filing rule it did not undergo the same sort of examination that is applied to rules that are not effective upon filing. However because of the way PHLX filed the rule, the Commission did not recognize that because of the corporate structure of PHLX as a demutualized for-profit corporation, where the other exchanges who had a similar rule were not-for-profit mutual associations, the rule should have been subject to the full approval process to analyze and distinguish between the two forms of corporate governance and the impact that factor would have with respect to how the term “business of the exchange” is defined and limited. Clearly, a for-profit corporation has a scope of business different in scope and in kind from not-for-profit exchanges. Nevertheless, federal securities law claims and corporate shareholder claims under Delaware law are not “the business” of a for-profit exchange. The delinkage by PHLX of Rule 651 from other rules and the avoidance of the full approval process created the problem the SEC recognized in Feinberg, that “the business of the exchange” was broad and undefined.

The Feinberg decision also suggests, without finding, that because of the structure of Rule 651 (which applies only to members of an exchange) that a member shareholder bringing a shareholder suit could be subject to Rule 651. Congress never intended for state-protected shareholder rights, or private rights of action under the federal securities laws, to be impinged upon by the SEC or by SROs. However the Commission in Feinberg found that the fee shifting allowed by Rule 651 represents a business decision by the membership to shift the financial burden of litigation to the responsible member under certain circumstances. That position may be correct for not-for-profit exchanges, but in a for-profit exchange, as written and applied, Rule 651 impinges upon shareholder rights - which Congress does not allow.

As the Commission notes in Feinberg, the Exchange Act requires that an SRO apply its rules consistently with the Act’s purposes. The Commission has acknowledged in Feinberg that Rule 651 cannot be applied in insider trading cases because it would insulate an exchange and its directors from liability in all but the most distantly connected cases. Similarly, Rule 651 insulates PHLX and its directors from shareholder liability suits, which is not consistent with the Exchange Act’s purpose.

By defining the term “related to the business of the exchange”, the Commission could clarify for an exchange member/shareholder what exposure, if any, the member would incur under Rule 651 in bringing a particular action. Further, since many of the exchanges are now demutualized for-profit entities, this analysis would apply to all such exchanges and thereby promote fairness and uniformity.

2. If PHLX had filed Rule 651 with an appropriate waiver request (to be allowed to file it as an effective upon filing rule), the SEC likely would have reviewed the rule in context and caught the problem in 2004. PHLX filed no such waiver request, unlike AMEX who filed its sister rule with the appropriate waiver request. Only rules' filings that pertain to dues, fees (relating to the business of the exchange like contract fees for transactions made between and among members and clearing organizations) may become effective upon filing. Any other rule filings are subject to the usual procedures which allow for commentary by interested parties and may be subject to hearings and briefs in favor of or opposed to the instant rule filing. Since Rule 651 falls into the latter category of rule, the proper procedure that should have been followed by PHLX, like the American Stock Exchange, was to file the rule and ask for a waiver of the "slow track" provisions and/or ask for a waiver of the thirty day effectiveness hiatus. By asserting to the Commission that the PHLX rule filing was analogous to other SROs and that it was entitled to effectiveness upon filing was wrong because the other SROs had indeed asked for the proper waiver(s) when they filed their rules some ten years before. The assertion was inaccurate at the least and PHLX received the "fast track" treatment to which it was not entitled (without the waiver request).

3. The Rule should make an absolute distinction between legal actions filed by "members" of PHLX with respect to the role of PHLX as an SRO (such as complaints/legal actions relating to internal exchange actions and oversight and other exchange activity) and legal actions filed by shareholders of PHLX in their role as investors. The Rule, or a definitional section, should make it clear that shareholders' rights to take whatever actions are available to them as shareholders under applicable laws are not affected by Rule 651.

The Rule, as written and applied, puts member-shareholders in the position of having fewer rights than all other PHLX shareholders (in effect creating two classes of stock). The huge penalty that could be imposed due to an adverse result from instituting a shareholder action has the effect of discouraging shareholders – *the owners of the company* – from seeking remedies that are available under state law to the shareholders of every other public firm. In our view, this goes far beyond the authority of an SRO.

4. Finally, we believe that the last part of Rule 651, which allows the PHLX Board to decide to waive application of the rule, is deficient in that it presents a substantial risk in terms of transparency and predictability, and also raises serious due process risks. If the board of an SRO has discretion to waive imposition of the penalties assessed by such a rule without also being required to make the process by which such waivers are considered open and transparent the problems described above can be made even more serious, and possibly subject to abuse by Board members if they have a personal interest in the outcome of the litigation. We urge the Commission to require that a fair and open process be followed which allows all members of an exchange to be informed of all actions relating to imposition/waiver of charges under a Rule 651-type rule, such that they would be

properly informed of how and when the SRO would seek to exercise such discretion and impose such costs.

We believe that this petition meets the requirement of the regulation noted above, which requires that it include "a statement setting forth the text or substance of any proposed rule or amendment...and stating the nature of his or her interest and his or her reasons for seeking the issuance, amendment or repeal of the rule."

Thank you for your consideration of this petition.

We respectfully ask the Commission to take such action as may be necessary to effectuate the changes suggested above, and stand ready to provide additional information at your request.

Sincerely,

PENNMONT SECURITIES

A handwritten signature in black ink, appearing to read "Joseph D. Carapico". The signature is written in a cursive style with a large initial "J" and "C".

Joseph D. Carapico, G.P.

Encls.: (5)

Liability Provisions

The Exchange also is adopting several new provisions related to the liability of the Exchange and its officers, directors, or employees. First, new Rule 17 under Article I of the Exchange's Rules **prohibits members from instituting a lawsuit or any other type of legal proceeding against any officer, director, employee or agent of the Exchange if that person was acting on Exchange business. The provision does not prohibit members from suing the Exchange itself, nor does it apply where there has been a violation of the federal securities laws.**

Second, the Exchange is adopting a new rule that **limits the liability of the Exchange to members for non-performance or misperformance of its duties and responsibilities, except where damages are suffered as a result of the willful misconduct, gross negligence, bad faith, or fraudulent or criminal acts of the Exchange or its officers, employees or agents, and except where there has been a violation of the federal securities laws. The Rule is in addition to the limitation of Exchange liability as a result of a member's use or enjoyment of Exchange facilities currently contained in the Exchange's Constitution.** ^[FN17]

Finally, the Exchange is adopting a Rule that requires members who fail to prevail in a lawsuit or administrative adjudicative proceeding they institute against the Exchange or its officers, directors, and employees, to pay all of the Exchange's reasonable expenses, including attorneys' fees, incurred by the Exchange in the defense of such proceeding. This provision is applied only in the event that the Exchange's expenses exceed \$50,000. In addition, the new Rule does not apply to internal disciplinary actions by the Exchange or administrative appeals.

*4

The Commission further believes the liability provisions described above should be approved. Specifically, the rule change prohibiting members from suing Exchange officers, directors, employees, or agents of the Exchange will prevent those parties **from having liability to members when acting on official Exchange business, while maintaining members' ability**

to pursue actions against the Exchange itself, as well as the ability to sue those persons and the Exchange for violations of the federal securities laws. Moreover, under the provisions, actions against Board members for breach of fiduciary duty consistent with Delaware law could still be pursued.^[FN23] The Commission believes this provision is consistent with the Act because it will help to ensure that such persons will be able to carry out their duties under the Act and enforce compliance with the Act, the rules thereunder and Exchange rules without the threat of personal liability from a lawsuit.

S.E.C. Release No. 34-37421, File No. SR-CBOE-96-02, 62 S.E.C. Docket 824, 1996 WL 390709 (July 11, 1996)

A. Exchange Liability

The Principal rule concerning Exchange liability is Rule 6.7(a), which currently provides that the Exchange shall not be liable to members, member organizations, or to associated persons for loss, damages, or **claims arising out of the use or enjoyment of the facilities afforded by the Exchange,**

B. Legal Proceedings Against Exchange Directors, Officers, Employees, or Agents

The proposed amendment adds new Rule 6.7A, which **prohibits** a member or associated person from instituting a lawsuit or any other legal proceeding against any director, officer, employee, agent, or other official of the Exchange or any subsidiary, **for actions taken or omitted to be taken in connection with the official business of the Exchange** or any subsidiary. Rule 6.7A, however, **does not apply to violations of the federal securities laws where a private right of action exists,** to appeals of disciplinary actions, or to other actions by the Exchange as provided for in the rules of the Exchange. According to the Exchange, **the purpose of disallowing lawsuits** or other legal proceedings against Exchange officials or agents **when they are acting on Exchange business** is to eliminate the potential exposure to personal liability of such persons, which impairs

their ability to perform their duties.

B. Legal Proceedings Against Exchange Directors, Officers, Employees, or Agents

The Commission believes that the rule change prohibiting members from instituting certain types of legal proceedings against Exchange officials should be approved. Specifically, the rule change prohibits members and associated persons from instituting lawsuits or any other legal proceeding against any director, officer, employee, agent, or other official of the Exchange or any subsidiary of the Exchange, **for actions taken or omitted to be taken by these parties in connection with official business of the Exchange** or any subsidiary. New Rule 6.7A, however, does not impair a members' ability to initiate legal action based upon violations of the federal securities laws for which a private right of action exists, appeals of disciplinary actions, or other actions by the CBOE as provided for in the Exchange's rules. The Commission believes that new Rule 6.7A is consistent with the Act because it will help to ensure that the covered persons will be able to carry out their duties under the Act, and to enforce compliance with the Act and the rules thereunder, as well as the rules of the Exchange, without the threat of personal liability.

S.E.C. Release No. 34-37563, File No. SR-PSE-96-21, 62 S.E.C. Docket 1527, 1996 WL 466637 (August 14, 1996)

*2 B. Legal Proceedings Against Exchange Governors, Officers, Employees, or Agents

New Rule 13.3^[FN10] prohibits a member or associated person from instituting a lawsuit or any other type of legal proceeding against any Governor, officer, employee, agent, or other official of the Exchange or any of its subsidiaries based on actions taken or omitted to be taken **while such person is acting on Exchange business** or the business of any of its subsidiaries. Rule 13.3, however, **does not apply where private rights of action under the federal securities laws exist**, to appeals of disciplinary actions, to other actions by the Exchange as

provided for in its rules, and, **with respect to the Governors of the Exchange, to the extent such action or omission is inconsistent with the Exchange's Certificate of Incorporation.**

The Exchange notes that new Rule 13.3 does not prohibit a member from suing the Exchange as a result of the actions of these individuals; rather it merely prohibits suits against the person in his or her individual capacity. According to the PSE, the purpose of disallowing lawsuits or other legal proceedings against Exchange officials or agents when they are acting on Exchange business is to eliminate the potential exposure to personal liability of such persons which impairs their ability to perform their duties.

C. Exchange's Costs of Defending Legal Proceedings

New Rule 13.4^[FN11] requires a member or associated person who fails to prevail in a lawsuit or other legal proceeding instituted by that person against the Exchange or other specified persons, **and related to the business of the Exchange,** to pay to the Exchange all reasonable expenses, including attorney's fees, incurred by the Exchange in its defense of such proceeding. The requirement would apply only where the costs exceed fifty thousand dollars (\$50,000).

S.E.C. Release No. 34-47842, File No. SR-Amex-2003-35, 80 S.E.C. Docket 535, 2003 WL 21099697 (May 13, 2003)

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

1. Purpose

***2 Legal proceedings can significantly divert staff resources away from the Exchange's regulatory and business purposes.** In addition, these proceedings often require the Exchange to secure outside counsel - a costly undertaking. The Exchange believes that seeking to ensure that only merit-based legal proceedings are pursued against the Exchange by members, member

organizations, limited trading permit holders, approved persons or persons associated with any of the foregoing will help protect against Exchange resources being unnecessarily diverted from the Exchange's regulatory and business objectives, thus strengthening the overall organization. **To this end, the Exchange is proposing to adopt a rule similar to one already in effect at the Chicago Board Options Exchange ("CBOE")**^[FN5] requiring specified persons who bring legal proceedings against the Exchange and/or persons acting on the Exchange's behalf but who do not prevail to reimburse the Exchange for all costs associated with defending such proceedings when these costs exceed fifty thousand dollars. The proposed rule would not apply to disciplinary actions by the Exchange, administrative appeals of Exchange actions or in any specific instance where the Board has granted a waiver of this provision.

***3** Pursuant to Rule 19b-4(f)(6)(iii) under the Act,^[FN10] the proposal may not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, and the self-regulatory organization must file notice of its intent to file the proposed rule change at least five business days beforehand. Amex has requested that the Commission waive the five-day pre-filing requirement and the 30-day operative delay **so that the proposed rule change will become immediately effective upon filing.**