

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-61405; File No. SR-Phlx-2009-101)

January 21, 2010

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Order Approving a Proposed Rule Change Relating to Collection of Exchange Fees

I. Introduction

On December 8, 2009, NASDAQ OMX PHLX, Inc. (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend Exchange Rule 909, Security for Exchange Fees and Other Claims, to require member organizations to provide a clearing account number at the National Securities Clearing Corporation (“NSCC”) for purposes of permitting the Exchange to debit any undisputed or final fees, fines, charges and/or other monetary sanctions or monies owed to the Exchange.<sup>3</sup> The proposed rule change was published for comment in the Federal Register on December 17, 2009.<sup>4</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

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

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

<sup>3</sup> This includes, among other things, fines which result from: violation of Rule 60, Order and Decorum; violations of the Minor Rule Plan pursuant to Rule 970; monetary sanctions imposed by the Business Conduct Committee relating to a Letter of Caution; and monetary sanctions imposed by a Hearing Panel in connection with Disciplinary Violations. See also Notice, infra note 4, for further information regarding disciplinary and non-disciplinary sanctions.

<sup>4</sup> See Securities Exchange Act Release No. 61141 (December 10, 2009), 74 FR 67003 (December 17, 2009)(“Notice”).

## II. Description of the Proposal

Currently, Phlx Rule 909 requires member organizations and applicants for registration to provide and maintain a security deposit, unless the member organization maintains excess net capital of at least the amount established by the Exchange. The Exchange proposes to eliminate the requirement to provide and maintain a security deposit and would instead require member organizations and applicants to provide a clearing account number for an account at NSCC in order to permit the Exchange to debit undisputed or final fees, fines, charges and/or other monetary sanctions or monies owed to the Exchange or other charges related to Rule 924.<sup>5</sup> Additionally, the Exchange proposes to amend the title of Rule 909 from “Security for Exchange Fees and Other Claims” to “Collection of Exchange Fees and Other Claims” in order to more accurately describe the proposed rule.

Under the proposal, the Exchange would send a monthly invoice to each member organization on approximately the fourth through sixth business day of the month following the month in which the charges were incurred.<sup>6</sup> In addition, the Exchange would send a file to the member’s clearing firm which will indicate the amounts to be debited from each member. If a member is self-clearing, no such file would be sent, since the member would receive the invoice indicating the amount to be debited. If a member disputes an invoice in writing to the

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<sup>5</sup> Phlx Rule 924 (Obligations of Members and Member Organizations to the Exchange) states, among other things, that members and member organizations shall be liable for such fees, fines, dues, penalties and other amounts imposed by the Exchange.

<sup>6</sup> For example, invoices for the month of October might be sent on November 5.

Exchange's designated staff by the fifteenth of the month, and the amount in dispute is at least \$10,000 or greater, the Exchange would not include the disputed amount in the debit.<sup>7</sup>

The Exchange then would send a file to NSCC on approximately the twenty-third of the month following the month in which the charges were incurred to initiate the debit of the appropriate amount. Once NSCC receives the file from the Exchange, NSCC would debit the amount indicated from the clearing members' account.<sup>8</sup>

The Exchange would provide members with a thirty-day period, upon Commission approval of this proposal, to provide an NSCC number to the Phlx Membership Department if the member has not already provided one in the past.<sup>9</sup>

### III. Discussion and Commission Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>10</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>11</sup> 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

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<sup>7</sup> If the fifteenth day is not a business day, then the member would have until the following business day.

<sup>8</sup> If the member clears through an Exchange clearing member, the estimated transactions fees owed to the Exchange are typically debited by the clearing member on a daily basis using daily transaction detail reports provided by the Exchange to the clearing member in order to ensure adequate funds have been escrowed.

<sup>9</sup> The Exchange noted that many of its members have already provided voluntarily the Exchange with an NSCC clearing account number, and those members' accounts are currently being debited on a monthly basis. See Notice, supra note 4, at note 10.

<sup>10</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

open market and a national market system, and, in general to protect investors and the public interest.

The Commission notes that Phlx would only initiate a debit for an undisputed or final fee, fine, charge, or other monetary sanction or money owed to the Exchange. In addition, because members would receive invoices approximately two weeks before any funds are debited, members would have a means to monitor the accuracy of their invoices and, if necessary, would have time to contact the Exchange staff prior to amounts being debited.

Further, the Exchange has informed the Commission that the vast majority of the Exchange's members already voluntarily participate in the automatic-debit program, which the proposed rule would make mandatory. Those members that do not currently participate will have thirty days from approval of this proposal to provide the NSCC number to the Exchange. Finally, the Commission notes that no comments were received regarding the proposal.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change, (SR-Phlx-2009-101), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>12</sup> 15 U.S.C. 78s(b)(2).

<sup>13</sup> 17 CFR 200.30-3(a)(12).