

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-54011; File No. SR-Phlx-2005-65)

June 16, 2006

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Granting Accelerated Approval of Proposed Rule Change as Amended by Amendment No. 1 Relating to the Exchange's Business Conduct Committee and Disciplinary Rules

I. Introduction

On November 2, 2005, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² to amend the Exchange By-Law Article X, Section 10-11 ("Business Conduct Committee") and Exchange Rules 960 and 970, the disciplinary rules. The Phlx filed Amendment No. 1 to the proposed rule change on May 16, 2006. The proposed rule change, as amended, was published for comment in the Federal Register on May 26, 2006 for a 15-day comment period, which ended on June 12, 2006.³ The Commission received no comments on the proposal. This order approves the proposed rule change, as amended, on an accelerated basis.

II. Description of the Proposed Rule Change

The Phlx proposes to create the new staff position of a "Hearing Officer," who, along with two other Hearing Panelists, would hear contested disciplinary matters that are currently heard by a Panel appointed by the Chairman of the Business Conduct Committee ("BCC" or "Committee"). In connection with creating the Hearing Officer position, the Phlx proposes to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 53846 (May 19, 2006), 71 FR 30462.

amend Exchange By-law Article X, Section 10-11, which governs the BCC, and Exchange Rules 960 and 970, the disciplinary rules.

Background

Pursuant to Exchange Rule 960.5(a), a hearing on a Statement of Charges is currently held before a Hearing Panel composed of three persons appointed by the Chairman of the BCC or the Chairman's designee. The presiding person of each Hearing Panel is a member of the Committee. The other two persons on the Hearing Panel are members of the Exchange, or general partners or officers of member organizations, or such other persons whom the Chairman of the BCC or the Chairman's designee considers to be qualified.

Pursuant to Exchange Rule 960.5(a)(4), Hearing Panelists currently may be compensated in extraordinary cases, as determined by the Chairman of the BCC, in consultation with the Chairman of the Board of Governors. Exchange Rule 960.5(a)(4) provides factors to be considered when determining whether a case is extraordinary, which include but are not limited to the anticipated length of time of the hearing, the complexity and seriousness of the matter, and the magnitude of the potential penalty.

Currently, pursuant to Exchange Rule 960.5(d), after the conclusion of the hearing, the Hearing Panel reviews the entire record of the proceeding and submits a written hearing report to the Committee containing proposed findings of fact concerning the allegations in the Statement of Charges, conclusions as to whether a violation within the disciplinary jurisdiction of the Exchange has occurred and an enumeration of such violations, and recommendations as to appropriate sanctions, to be considered by the Committee at the next Committee meeting after the report is completed.

Pursuant to Exchange Rule 960.8, currently, after reviewing the entire record of the disciplinary proceeding, the BCC, by a majority of the members voting, determines whether the Respondent has committed violations and the appropriate sanctions, if any. The BCC then issues a written decision, including in its decision a statement of findings and conclusions, with the reasons therefor, upon all material issues presented in the record, and whether each violation within the disciplinary jurisdiction of the Exchange alleged in the Statement of Charges has occurred.

Hearing Officer

The Exchange proposes to establish a new permanent professional position of Hearing Officer. The responsibilities of the Hearing Officer would include, but not be limited to: presiding over hearings in contested disciplinary cases authorized by the Exchange's BCC, conducting pre-hearing conferences, ruling on procedural or discovery matters, scheduling hearing sessions, making all necessary evidentiary or other rulings (in consultation with the Hearing Panelists), regulating the conduct of the hearing, imposing appropriate sanctions for improper conduct by a party or a party's representative, drafting and issuing decisions on behalf of the Hearing Panel and rendering decisions in connection with Summary Disposition Proceedings. The Hearing Officer would not be permitted to be involved in any manner in the investigation of possible misconduct, to participate in the consideration by the BCC of whether to institute a disciplinary action, to render a decision following a hearing without the concurrence of a majority of the Hearing Panel, to rule upon requests to disqualify the Hearing Officer or any

member of the Hearing Panel, or to issue citations for violations of Exchange rules or floor procedure advices.⁴

The Hearing Officer would report to the Audit Committee for all performance and compensation purposes to help ensure that the Hearing Officer is completely neutral and accountable to the Audit Committee alone. The Hearing Officer would merely report to the General Counsel or his or her designee to comply with policies and procedures applicable to all employees of the Exchange, such as reporting vacation time or sick leave.

Hearing Panelists

The BCC Chair, or the Chair's designee, would select two Hearing Panelists for each matter from a pool of qualified individuals.⁵ Consistent with current practice, the Hearing Panelists would be selected based on their background, experience and training, which should qualify them to consider and make determinations regarding the subject matter to be presented to the Hearing Panel. The Chair would also consider other factors, including the availability of the individual Hearing Panelists, the extent of their prior service on Hearing Panels and any

⁴ In addition, in accordance with By-Law Article X, Section 10-11, the jurisdiction of the Hearing Officer and Hearing Panel shall not extend to the enforcement of rules and regulations of the Floor Procedure Committee or the Options Committee relating to order, decorum, health, safety and welfare on the trading floors, or to hearings held by and sanctions imposed by such committees relating to such matters, except as permitted by the rules of the Exchange or any interpretation thereof, and any regulations promulgated thereunder.

⁵ The Exchange intends to form a "pool" of pre-qualified Hearing Panelists for contested disciplinary cases. In order to form this pool, the staff intends to develop a questionnaire, using as a model the questionnaire currently used by the NASD for potential members of arbitration panels. Members of the BCC would not be eligible to serve as Hearing Panelists. However, as discussed in proposed Exchange Rule 960.5(a)(7), if the Hearing Officer is unable to preside over the hearing for any reason, the Chair of the BCC shall appoint a qualified replacement Hearing Officer for that hearing from a pre-screened pool of qualified candidates, which could possibly include a member of the BCC.

relationship between such persons and the Respondent, which might make it inappropriate for such persons to serve on the Hearing Panel.

After being designated as a qualified Hearing Panelist, the Exchange intends to have each prospective Hearing Panelist complete a mandatory training session to be conducted by the Hearing Officer. Qualified Hearing Panelists would serve for three-year terms. After that time, if a Hearing Panelist wished to continue serving, the Hearing Panelist would be required to submit an updated application for review and approval by the BCC.

The Exchange proposes that Hearing Panelists be compensated for all hearing sessions and for one deliberation session per disciplinary proceeding for which a Hearing Panel renders a decision. A hearing session would be defined as any meeting between the parties and Hearing Panel, including pre-hearing conferences, but no compensation would be paid for “study time” (i.e., reviewing materials in preparation for a pre-hearing conference or hearing). Hearing Panelists would be compensated at a fixed and non-negotiable rate for each hearing session that lasts four hours or less and for one deliberation session.⁶ For example, if a hearing on a given day lasted a total of six hours, Hearing Panelists would be compensated for two hearing sessions. If a case settled prior to a hearing, Hearing Panelists would not receive any compensation, unless a pre-hearing conference (which is included in the definition of a hearing session and for which compensation would be given) was held. If a hearing were cancelled, the Hearing Panelists would not be entitled to compensation, but would be reimbursed for any travel-related expenses incurred, if applicable. If a Hearing Panelist is also a member of the Board, any Board or

⁶ Compensation for Hearing Panelists would be subject to a cap amount per day, regardless of the number of hearing sessions (or Board or Committee meetings attended).

Standing Committee meetings that are held on the same day as the hearing would be considered a single meeting for the purposes of compensation.

Offers of Settlement and Issuance of Decisions

If an Offer of Settlement (“Offer”) is submitted to the BCC before a hearing commences, even if the Hearing Panelists are selected, the Committee would still consider the Offer and, if accepted, issue a decision. The Exchange proposes that, if an Offer is submitted after a hearing commences, however, the Exchange staff would promptly submit its position with respect to such Offer. The Hearing Panel would then determine whether to consider the Offer and, if considered, whether to accept or reject the Offer.

The Hearing Panel would review the entire record of the disciplinary proceeding (or the written submissions, if applicable)⁷ and, by a majority vote, determine whether the Respondent has committed violations and the appropriate sanctions, if any. The Hearing Panel would then issue a written decision, including in its decision a statement of findings and conclusions, with the reasons therefor, upon all material issues presented in the record, and whether each violation within the disciplinary jurisdiction of the Exchange alleged in the Statement of Charges has occurred. The Hearing Panel would be required to prepare its decision, absent extraordinary circumstances, within 60 days after Exchange staff has served the Hearing Officer and/or members of the Hearing Panel with a copy of the transcript of the hearing. A decision issued by the Hearing Panel would be considered final. Any appeal of the decision would be taken directly to the Exchange’s Board of Governors.

⁷ In lieu of requesting a hearing, a Respondent may request that the matter be decided upon written submissions. The Hearing Officer shall decide whether to grant the request and determine a schedule for each party to make its respective submissions. See proposed Exchange Rule 960.4.

III. Discussion

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁸ In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,⁹ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. In addition, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(6) of the Act,¹⁰ which requires that the rules of the exchange provide that its members and persons associated with its members shall be appropriately disciplined for violation of the provisions of the Act, the rules and regulations thereunder, or the rules of the exchange, and with Section 6(b)(7) of Act,¹¹ which requires that the rules of the exchange provide a fair procedure for the disciplining of members and persons associated with members.

The Commission believes that the proposed rule change should streamline and expedite the hearing process by having a permanent Hearing Officer and pre-screened, qualified Hearing Panelists, and by having the Hearing Panel issue a final decision itself, without having to go to

⁸ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ 15 U.S.C. 78f(b)(6).

¹¹ 15 U.S.C. 78f(b)(7).

the BCC for review and approval. In addition, the Commission notes that the Exchange proposes to place restrictions on the activities of the Hearing Officer, and to require a Hearing Officer or Hearing Panelist to remove himself from consideration of a matter if he cannot render a fair and impartial decision. The Commission believes that these measures should help to ensure to that the Hearing Officer and Hearing Panelists are completely neutral and that their decisions are fair and impartial. Furthermore, the Commission believes that having a single Hearing Officer preside over all hearings will increase the likelihood that more uniform sanctions will be imposed for similar misconduct by members, making the Exchange's disciplinary process more fair.

The Commission finds good cause for accelerating approval of the proposed rule change, as amended by Amendment No. 1, prior to the 30th day after the date of publication of notice of the filing in the Federal Register. The Commission published the proposed rule change for public comment on May 26, 2006 for a 15-day comment period and received no comments on the proposal. The Commission believes that accelerated approval should expedite the appointment of a hearing officer and allow the Exchange to implement a more efficient disciplinary process.¹²

¹² The Commission notes that the Exchange has represented that the BCC will hear any current matters through their completion if a hearing commenced prior to the date of this approval order. Thus, any ongoing hearing will be heard by the BCC through its completion and the BCC will issue a decision accordingly.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (SR-Phlx-2005-65), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Nancy M. Morris
Secretary

¹³ 15 U.S.C. 78s(b)(2).

¹⁴ 17 CFR 200.30-3(a)(12).