

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60961; File No. SR-Phlx-2009-84)

November 6, 2009

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Conduct of Business on the Exchange

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹, and Rule 19b-4² thereunder, notice is hereby given that on October 29, 2009, NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. On November 6, 2009, the Exchange filed Amendment No. 1. 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 Exchange proposes to amend the Rules to: (i) create an expedited hearing process for members posing an immediate threat to the safety of persons or property, seriously disrupting Exchange operations, or are in possession of a firearm on the Exchange trading floor; (ii) increase the time period a member may be physically excluded from the trading floor; (iii) increase the maximum amount a member may be charged pursuant to Rule 60; (iv) amend language applicable to contesting citations and create a forum fee of \$100 for contesting citations; (v) add clarifying language to prohibit alcohol and illegal controlled substances on the trading floor; (vi) increase fines for various regulations; (vii) require non-member visitors who are performing contract work at the Exchange to provide a certificate of insurance and add a fee

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

schedule for failure to provide such proof of insurance; (viii) add a new rule to limit exchange liability and require reimbursement of certain expenses; (ix) amend the disciplinary rules to allow Enforcement Staff to request a hearing; and (x) increase the limit on fees from \$5,000 to \$10,000 and add additional clarifying language to Rule 970.

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/>, at the principal office of the Exchange, 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 Exchange 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

Order and Decorum Regulations

The purpose of the proposed rule change is to ensure the efficient, uninterrupted conduct of business on the Exchange and provide a trading floor environment free from conduct that could distract or interfere with market activity. Additionally, the Exchange proposes to provide a fair process for members to be heard with respect to removals.

Currently, the Exchange may summarily remove a member from the floor for breaches of regulations that relate to the administration of order, decorum, health, safety and welfare on the

Exchange ("order and decorum" regulations). Exchange By-Law Article VIII, Section 8-1, provides "[t]he Exchange shall make and enforce rules and regulations relating to order, decorum, health, safety and welfare on the options trading floor and the immediately adjacent premises of the Exchange and shall be empowered to impose penalties for violations thereof. For breaches of order, the President and his designated staff may exclude Members, participants and Member Organizations and participant organizations (as applicable) and employees from the trading floor and the immediately adjacent premises, or may impose fines consistent with Exchange rules, or both. They shall administer the provisions of these By-Laws and the Rules of the Exchange pertaining to the trading floor and the immediately adjacent premises of the Exchange."³ Removal from the trading floor is not the exclusive sanction for breaches of order and decorum and the regulations thereunder. In addition to removal, a member could also be subject to a fine or the matter could also be referred to the Business Conduct Committee where it would proceed in accordance with Rules 960.1 through 960.12.⁴ Removal occurs when a member poses an immediate threat to the safety of persons or property, seriously disrupts Exchange operations, or is in possession of a firearm. When a member is removed under any of these circumstances, the current rule provides that the member is removed for the remainder of the trading day. Removal is ordered only for the serious types of breaches of order and decorum.

³ For purposes of this proposed Rule, the premises immediately adjacent to the trading floor shall include the following: (1) All premises other than the trading floor that are under Exchange control; and (2) premises in the building where the Exchange maintains its principal office and place of business, namely 1900 Market Street, Philadelphia, Pennsylvania. See Exchange Rule 60 (b)(iii).

⁴ These rules provide the jurisdiction, procedures and process by which an Exchange member, member organization, or any partner, officer, director or person employed by or associated with any member or member organization may be charged with a violation within the disciplinary jurisdiction of the Exchange. Reports to the Securities and Exchange Commission are made pursuant to Rule 19d-1(c) under the Act. See also Exchange Rule 60 (b)(iv).

The Exchange currently has the ability to exclude a member for multiple days. Each day a determination is made as to whether the member poses a continued threat. The Exchange believes that this process of making daily determinations after an incident has occurred is disruptive and poses a risk in permitting members to return to the trading floor only to possibly be removed again once that member can be evaluated in the event that the threat is serious and ongoing.

The Exchange proposes to amend Rule 60, Sanctions for Breach of Regulations, to exclude a member up to five (5) business days to ensure that it is able to provide a trading floor environment free from conduct that could distract or interfere with market activity. The Exchange believes that exclusion for the remainder of the trading day is not a serious deterrent to violating the most serious order and decorum rules, especially where members violate such rules near the end of a trading day. While the disciplinary rules may provide for discipline of such members, the immediate threat that is posed to other members and Exchange staff as well as the order of the operation of the trading floor is not alleviated by a same day suspension. The Exchange acknowledges that removal may result in a loss of business for the member and therefore has proposed an expedited hearing to create a fair procedure for the immediate removal.⁵ The proposal would allow for an expedited hearing to take place within two full working days hours [sic] after the member's exclusion from the trading floor. This would initially exclude the member in all removal circumstances for the forty-eight hour period, which the Exchange believes would serve as a "cooling down" period. The member would be provided with written notice of the hearing, including the date, time and place of the hearing. The member

⁵ The removal would not impact other associated persons of the member organization, only the member that was involved in the conduct at issue. Also, the member that is subject to the removal would not be denied any electronic access to the Exchange.

may be represented by counsel. The Expedited Hearing Officer or his or her designee would conduct the hearing. The Expedited Hearing Officer would make a determination if the removal should continue and if so would determine for what period of time, not to exceed a total of five (5) business days. The determination of the Hearing Officer would be based on the severity of the threat posed to persons on the trading floor, the disruptiveness caused by the member and the safety and welfare of persons on the trading floor. A ruling would be made at the time of the hearing and a written decision would be provided afterwards, within two (2) business days. The exclusion would only apply to the particular member's physical presence on the trading floor.

The Exchange proposes to amend Commentary (a) to Rule 60 to increase the maximum amount of a pre-set fine for order and decorum violations. The Exchange believes that the proposed increase from a maximum of \$5,000.00 to a maximum of \$10,000.00 is appropriate and warranted considering the types of violations that may arise from violations of order and decorum. The Exchange believes that the fines should be increased where the safety and welfare of members are at issue and further that the fines should deter members from engaging in certain conduct.

Additionally, the proposal seeks to further clarify the contested citation process. Specifically, the Hearing Director may decide that: (i) the citation should be overturned; (ii) the citation is valid as issued; or (iii) the citation as issued should be modified to specify either a higher or lower fine than the one on the notice as issued. Further, the Exchange proposes to add a forum fee of \$100 if a fine is contested pursuant to Rule 60 and the citation is upheld by the reviewing body.⁶ The Exchange also proposes to add language to Rule 60 Commentary (a) .07

⁶ The Exchange currently charges a fee to review disputes pursuant to Exchange Rule 124. See also Securities Exchange Act Rel. No. 46600 (October 4, 2002), 67 FR 63480 (October 11, 2002) (SR-CBOE-2002-39) (CBOE has a similar rule imposing a forum fee against persons contesting citations).

to make clear that a report would not be made to the Securities and Exchange Commission (“Commission”) in the case of a contested citation where the fine is less than \$1,000 and the Hearing Director found in favor of the appellant. The addition of the words “and the Hearing Director finds in favor of the appellant” is only to clarify an existing practice. The Exchange believes that the additional language is clarifying language with respect to the findings of the Hearing Director. The forum fee will assist the Exchange in defraying costs associated with conducting contested citation hearings.

The Exchange proposes to further specify two categories within Rule 60 Regulations, namely alcohol and illegal controlled substances. While the Exchange believes that these violations are currently prohibited under its current regulations, the Exchange proposes to specifically state in Regulations 1, Smoking, and 4, Order, respectively, that alcoholic beverages and illegal controlled substances are specifically prohibited on the trading floor or on the premises immediately adjacent to the trading floor. The Exchange believes that specifically stating that alcoholic beverages and illegal controlled substances are not permitted on the trading floor is a clear statement which eliminates ambiguity. The Exchange believes that this language reinforces already existing policies. The Exchange proposes to amend the title of Regulation 1 to state “Smoking and Alcohol” and set a fine schedule for violations of Regulation 1 relating to alcohol. The Exchange proposes a \$1,000.00 fine for the 1st occurrence and thereafter referral to the Business Conduct Committee. The Exchange proposes to amend Regulation 4 to set a \$5,000.00 fine for possession of an illegal controlled substance and thereafter referral to the Business Conduct Committee. The Exchange believes that these fines are appropriate given the nature of the acts and that the fines would serve as a deterrent for members with regard to the presence of those substances on the trading floor. Similarly, the Exchange proposes to add

restitution to the vandalism fine schedule to clarify that members are required to make restitution to the Exchange for any vandalism in addition to the fine. The Exchange believes this added language will likewise reinforce an existing policy.

With respect to fines related to Regulation 1, Smoking, Regulation 2, Foods, Liquids and Beverages, Trash, Litter and Vandalism, and Regulation 4, Order, the Exchange proposes increasing those fines to create a deterrent in further prohibiting such activity. The fines in Regulation 1 would be increased from an Official Warning for the 1st occurrence, \$250.00 for the 2nd occurrence and \$500.00 for the 3rd occurrence to \$250.00 for the 1st occurrence, \$500.00 for the 2nd occurrence, and \$1,000.00 for the 3rd occurrence. The fines in Regulation 2 for Foods, Liquids and Beverages would be increased from \$100.00 for a 1st occurrence, \$200.00 for a 2nd occurrence, and \$300.00 for a 3rd occurrence to \$250.00 for a 1st occurrence, \$500.00 for a 2nd occurrence and \$1,000 for a 3rd occurrence. The Vandalism fines would be increased from \$250.00 for a 1st occurrence, \$500.00 for a 2nd occurrence and \$1,000.00 for a 3rd occurrence to \$3,000.00 and restitution for the 1st occurrence, \$5,000.00 and restitution for the 2nd occurrence, \$10,000.00 and restitution for the 3rd occurrence. Regulation 4 fines would be increased for fines resulting from indecorous conduct from \$250.00 for the 1st occurrence, \$500.00 for the 2nd occurrence, and \$1,000.00 for the 3rd occurrence to \$500.00 for the 1st occurrence, \$1,000.00 for the 2nd occurrence and \$2,500.00 for the 3rd occurrence. Regulation 4 fines for threatening, abusive, harassing or intimidating speech or conduct would be increased from \$1,000.00 for the 1st occurrence, \$2,500.00 for the 2nd occurrence and \$5,000.00 for the 3rd occurrence to \$2,500.00 for the 1st occurrence, \$5,000.00 for the 2nd occurrence and the 3rd occurrence would

be a referral to the Business Conduct Committee. The Exchange believes these increased fines⁷ are necessary to create an adequate deterrence to prevent certain conduct on the trading floor. In addition, the process of issuing citations and holding hearings for appeals can significantly divert Exchange time and resources away from the regulatory purposes of the Exchange. In addition, the goal of maintaining order and decorum on the trading floor is best accomplished when floor members are deterred by such conduct [sic], rather than when violations occur and fines are simply paid. The Exchange believes that by increasing fees, members will be deterred from violating the order and decorum rules which exist for the safety and welfare of Exchange members and employees alike. Finally, the Exchange believes that the fine increases are commensurate with the possible threat such conduct creates to the safety and welfare of others on the trading floor.

The Exchange proposes amending Regulation 5, Visitors, to require non-member visitors who are performing contract work at the Exchange on behalf of a member to provide a certificate of insurance evidencing Professional Liability Insurance. This would include non-member visitors performing any type of work at the Exchange or utilizing building facilities. The Exchange leases its premises and this requirement would assist the Exchange in shifting costs that arise from any liability to the Exchange as a result of damage or loss caused by a contractor or other person engaged by a member. The Exchange proposes a fine schedule as follows: \$1,000.00 for the 1st occurrence, \$5,000.00 for the 2nd occurrence and referral to the Business Conduct Committee thereafter. The Exchange believes that by imposing a fine for violations of the obligation to require contractors hired by members to produce a certificate of insurance will

⁷ The Exchange increased the maximum amount of a pre-sent fine for order and decorum violations from \$1,000 to \$5,000 in 2002. See Securities Exchange Act Release No. 45905 (May 10, 2002), 67 FR 34978 (May 16, 2002) (SR-Phlx-2002-09).

deter such behavior and thereby benefit the Exchange and its members by having only insured contractors at the Exchange and thereby avoiding unnecessary costs.

Limitation of Exchange Liability and Reimbursement of Certain Expenses

The Exchange proposes the addition of a new rule 652. The purpose of this new rule is to limit the liability of the Exchange and obtain reimbursement of legal costs incurred to defend litigation brought against the Exchange. 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 establishing a rule that limits liability, seeks reimbursement of costs related to document production and seeks reimbursement of other legal costs may reduce non merit-based or vexatious legal proceedings against the Exchange by member litigants and help protect against the Exchange's resources being unnecessarily diverted from regulatory and business objectives, thus strengthening the overall organization.

The Exchange proposes to limit liability for any damages sustained by a member, member organization, or person associated with any of the foregoing, arising out of or relating to the use or enjoyment by such person or entity of Exchange facilities. Further, the Exchange proposes to add language to state that in the event that an action or proceeding is brought or a claim made to impose liability on the Exchange for an alleged failure on its part to prevent or to require action by a member, member organization, or person associated with any of the foregoing, such person or entity may, in the discretion of the Exchange, be required to reimburse the Exchange for: all expenses, including counsel fees incurred in connection with said action, proceeding or claim; recovery if any against the Exchange upon a final determination that the Exchange was liable for the damage sustained; any payment made by the Exchange, with the

approval of the member, member organization or person associated with any of the foregoing in connection with any settlement; provided that no member, member organization or person associated with any of the foregoing shall be required to reimburse the Exchange for any fine or any other civil penalty imposed on the Exchange by the Commission or other governmental entity for a violation by the Exchange of any provision of the Act or of any Commission Regulation, or where indemnification would otherwise be prohibited. Also Rule 652 provides that in the event that a member, member organization, or person associated with any of the foregoing fails to remit any amount due the Exchange under this rule or Rule 651⁸ such person shall be responsible for all costs of collection incurred by the Exchange, including counsel fees.⁹ The Exchange proposes to shift the cost of producing records, where legally required, to the member or member organization where such records relate to the business of affairs of a member, member organization or person associated with a member or member organization. The Exchange receives many requests for record production which are time consuming and increase the costs of operating the Exchange when staff resources are diverted away from Exchange business to meet the deadlines of legal document production related to member disputes and other legal proceedings involving members. The Exchange believes that this cost will assist the Exchange in reducing these costs. Also, the Exchange receives requests for documents from non-members who seek the documents from the Exchange instead of issuing a

⁸ Rule 651 requires members, member organizations, foreign currency options participants, foreign currency options participant organizations, or persons associated with any of the foregoing who bring legal proceedings against the Exchange to reimburse the Exchange for all costs associated with defending such proceedings, only when such persons or entities do not prevail and the Exchange 's costs exceed a specified amount. See Securities Exchange Act Release Nos. [sic] 50159 (August 5, 2009), 69 FR 49933 (August 12, 2004)(SR-Phlx-2004-47);

⁹ This would not apply to any objection or appeal by a member, member organization, or person associated with any of the foregoing considered by the Exchange or the Commission, or any appeal from a decision of the Commission.

subpoena to a member, who may also have such documents. The Exchange seeks to bill the members who are responsible for the request to produce documents received by the Exchange. The Exchange believes that requests for production of documents shift the burden of gathering and producing litigation materials from the member to the Exchange and the Exchange desires to shift the burden back to the member litigant. Rule 652(d) would apply to any costs incurred by the Exchange only after the rule becomes effective.

Minor Rule Plan

The Exchange proposes amending Rule 970, Floor Procedure Advices: Violations, Penalties, and Procedures, to increase the limit on fees from \$5,000 to \$10,000. Currently in lieu of commencing a disciplinary proceeding, the Exchange may impose a fine not to exceed \$5,000 on any member, member organization, or any partner, director or person employed by or associated with any member or member organization, for any violation of a Floor Procedure Advice of the Exchange, which violation the Exchange shall have determined is minor in nature, subject to the other requirements contained in Rule 970. The Exchange proposes to raise the amount of the fine from \$5,000 to \$10,000. Additionally, the Exchange has added additional language clarifying when fines are to be publically reported to the Commission. Any fine imposed pursuant to this Rule, and not exceeding \$2,500, and not contested shall not be publicly reported to the members except as may be required by Rule 19d-1 under the Securities Exchange Act of 1934, and as may be required by any other regulatory authority. Any fine imposed pursuant to this Rule which exceeds \$2,500 shall be publicly reported to the members and as required by Rule 19d-1 under the Securities Exchange Act of 1934, and as may be required by any other regulatory authority. The Exchange believes that increasing the cap on fines which are not subject to a disciplinary proceeding will provide for a more efficient operation of the minor

rule plan and allow certain Option Floor Procedure Advices to be increased without incurring the costs and resources of the regulatory staff to commence disciplinary proceedings. The Exchange believes that fines that are capped at \$2,500 may not create a deterrent and this increase will provide Exchange staff the ability to consider larger fines for violations of Floor Procedure Advices. The proposed language further explains the requirements for reporting fines to the Commission when the fine exceeds a certain amount.

Disciplinary Rules

The Exchange proposes to amend Rule 960.5 to add language to allow Enforcement Staff to request a hearing. Currently, a hearing on the Statement of Charges shall at the request of either Respondent or upon motion of the Business Conduct Committee be held before a Hearing Panel. The Exchange proposes modifying this process to allow Enforcement Staff to request a hearing. There are circumstances where the Respondent may not request a hearing and Enforcement staff may desire such a hearing. The Exchange believes that an opportunity to present information to the Hearing Panel aside from a Wells Notice and response may benefit the Hearing Panel in making a determination. The Exchange desires to afford the Enforcement Staff the opportunity to make such a request when they deem it necessary.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act¹⁰ in general, and furthers the objectives of Section 6(b)(5) of the Act¹¹ 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 a national market system, and, in general to protect

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

investors and the public interest, because the proposal should facilitate prompt, appropriate, and effective discipline for violations of Rule 60 and the regulations thereunder designed to maintain order on the Exchange. In addition, the Exchange believes that the proposed rule is consistent with section 6(b)(6) of the Act¹² which requires the rules of an exchange provide that its members be appropriately disciplined for violations of the Act as well as the rules and regulations thereunder, by imposing increased fine amounts for breaches of order and decorum to better reflect the severity of the violation and provide an appropriate form of deterrence for violation of Rule 60 and the regulations thereunder. The Exchange believes that the proposal to exclude members up to five (5) days and conduct an expedited hearing would provide a fair process for members to present their arguments surrounding a removal, while also allowing the Exchange to operate without disruption and threat of safety to members on the trading floor. The increase in the maximum amount of a pre-set fine for order and decorum violations is appropriate to serve as a deterrent to members in violating the order and decorum regulations which are necessary for the orderly operation of the market. The increased fines should create further deterrents in preventing certain activity on the trading floor which disrupts the orderly operation of the floor. The minor rule plan assists the regulatory staff in protecting its market to the benefit of customers. Also, the clarifying language and addition of fine schedules related to alcohol and illegal controlled substances to the Regulations should further clarify the order and decorum rules for members. The proposed language requiring non-member visitors to carry insurance should assist the Exchange in limiting its resources [sic] as well as proposed Rule 652 which is designed to conserve Exchange resources, which can be easily diverted to defending litigation claims and responding to non-Exchange related litigation matters on behalf of its members. Proposed Rule 652 is meant to prevent the Exchange from diverting valued resources

¹² 15 U.S.C. 78f(b)(6).

away from its main regulatory responsibilities and instead being consumed in litigation designed to siphon Exchange monies and staff. The Exchange believes that raising the amount of the fines that are subject to the minor rule plan will assist the Exchange in enforcing its rules in an efficient and expedited manner will [sic] still deterring members from committing ongoing violations. Finally, the Exchange believes that the amendments to the Hearing rule benefits [sic] the disciplinary process by allowing Exchange staff the opportunity to request hearings. The efficient operation of the disciplinary process allows for fair hearings of its members.

In addition, the Exchange believes that its proposal is consistent with Section 6(b) of the Act¹³ in general, and furthers the objectives of Section 6(b)(4) of the Act¹⁴ in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members. The Exchange believes that this proposal is equitable in that the forum fee would apply to all members equally. The addition of the forum fee will help the Exchange offset costs associated with reviewing contested citations.

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.

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

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(4).

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 shall: (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 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. Please include File No. SR-Phlx-2009-84 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2009-84. 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, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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-2009-84 and should be submitted on or before [insert date 21 days from the date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

Florence E. Harmon
Deputy Secretary

¹⁵ 17 CFR 200.30-3(a)(12).