

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50129; File No. SR-Phlx-2004-39)

July 30, 2004

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change, and Amendment No. 1 thereto, by the Philadelphia Stock Exchange, Inc. Relating to Retroactive Application of Permit Holder Fees

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 30, 2004, the Philadelphia Stock Exchange, Inc. (“Phlx” or the “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 Phlx. On July 12, 2004, the Phlx filed Amendment No. 1 to the proposed rule change.³ 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 retroactively apply its recent amendment to its schedule of fees and

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Murray L. Ross, Phlx, to Nancy Sanow, Assistant Director, Division of Market Regulation, SEC, dated July 9, 2004 (“Amendment No. 1”). In Amendment No. 1, the Exchange removed references in two footnotes to the proposed date that the retroactive fees would take effect.

Charges (“Fee Schedule Amendment”).⁴

In the Fee Schedule Amendment, the Exchange adopted an “other” permit fee category to address the limited situations where a permit holder might not fit within any of the existing permit fee categories.⁵ The Exchange had found that a few permit holders did not fit in any existing permit fee categories, and, consequently, no permit fee was applicable. For example, a member organization may be holding its permit solely to be able to reflect its status as a Phlx member organization on its letterhead, which is common in the securities industry. That member organization would not have qualified for any of the existing permit fee categories and, therefore, would not have been subject to a permit fee at all. The Exchange is proposing to retroactively apply the “other” permit fee category from February 2, 2004 through April 30, 2004, the period prior to the adoption of the “other” permit fee category, in order to collect permit fees from member organizations that previously had not been subject to a permit fee.

Additionally, the Exchange proposes to retroactively apply its billing policy set forth in the Fee Schedule Amendment, which set the date of notification for terminating a permit as the date that the permit fee billing would cease. From February 2, 2004 through April 30, 2004, the period prior to the Fee Schedule Amendment, the effective date of the posting period was used to

⁴ See Securities Exchange Act Release No. 49856 (June 15, 2004), 69 FR 3441 (June 21, 2004) (SR-Phlx-2004-32) (adopting a new category of permit holders for billing purposes; establishing the date of notification of terminating a permit as the date that permit fee billing will cease; and establishing that only one monthly permit fee would be assessed in certain limited situations where two monthly permit fees would otherwise be imposed).

⁵ The “other” permit fee category is intended to apply to permit holders who solely qualify their respective member organization.

determine the termination date for a permit, resulting in some member organizations being billed for an extra month.

Further, the Exchange is proposing to retroactively assess only one monthly permit fee in certain limited situations where two monthly permit fees otherwise would be imposed. Prior to the Fee Schedule Amendment, if a permit was transferred, other than if the transfer occurred within the permit holder's member organization,⁶ both member organizations would have been assessed a billing fee. For example, if the permit holder transferred from one member organization to another unrelated member organization in the same month, both member organizations were assessed a permit fee in the same billing period. In addition, when a permit holder became associated with another member organization as a result of a merger, partial sale of the current member organization, or other business combination, a new permit was issued but a monthly permit fee for the new permit would have also been assessed in these limited situations. This policy of assessing only one permit fee when a permit holder becomes associated with another member organization is noted in the Fee Schedule Amendment and, pursuant to the proposed rule change, would be retroactively applied from February 2, 2004 to April 30, 2004.

The text of the proposed rule change, as amended, is available at the Exchange and at the Commission.

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

⁶ If the permit holder transfers the permit to another individual within the same member organization, only one monthly permit fee is assessed for that permit.

and basis for the proposed rule change and discussed any comments it received on the proposed rule change, as amended. 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, as amended, is to retroactively apply the “other” permit fee category and the other recently adopted permit fee billing practices back to the initiation of permit fee billing on February 2, 2004 to more fairly apply Exchange permit fee policies to each permit holder and their respective member organizations. Retroactively applying the recently effective “other” category of permit fees should ensure that each permit holder has been billed an appropriate permit fee from February 2, 2004, the initial date of permit fee billing. Additionally, allowing monthly billing of permit fees to cease at the time a member notifies the Exchange, as opposed to waiting for the effective date of the posting and notice requirements, should avoid unnecessarily billing a member for permit fees for a month during which their permit was terminated. Also, charging only one permit fee for the month in which a merger or other business combination occurs should avoid unfairly double billing for a permit fee to a permit holder changing affiliation due to a merger or other business organizational changes.

2. Statutory Basis

The Exchange believes that its proposal to retroactively apply its amended schedule of dues, fees and charges is consistent with Section 6(b) of the Act⁷ in general, and furthers the objectives of Sections 6(b)(4)⁸ and 6(b)(5)⁹ of the Act in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among Exchange members and is designed to perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest.

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

The Phlx does not believe that the proposed rule change, as amended, will result in any burden on competition that is 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

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

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4).

⁹ 15 U.S.C. 78f(b)(5).

the Exchange consents, the Commission shall: (a) by order approve such 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. Please include File Number SR-Phlx-2004-39 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-Phlx-2004-39. 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, as amended, 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 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-2004-39 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Margaret H. McFarland
Deputy Secretary

¹⁰ 17 CFR 200.30-3(a)(12).