maintain separate corporate relations departments and disclose whether the existing clerical support of the combined units will be maintained or increased. Additionally, the rule now describes the type of information the QMOC considers in determining whether the public interest factor has been met. Finally, the proposal adopts factors the MPC must consider when assessing the impact of the proposed combination upon specialist performance and market quality with respect to the subject securities.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[8] Specifically, the Commission finds the proposed rule change is consistent with Section 6(b)(5) of the Act,[9] which requires among other things, that the rules of the Exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and national market system, and in general, to protect investors and the public interest.

The Commission believes that the proposed rule change is a reasonable modification of the Policy. The Commission does not believe that consolidations among specialist units are inherently harmful, and believes that in certain situations they can be beneficial, particularly for those units with limited capital. At the same time, the Commission recognizes that undue concentration may have negative effects on market quality by, among other things, hampering competition among specialists and reducing incentives for specialists to provide better markets.

The Commission believes that the modifications are reasonably designed to result in approval of proposed combinations that will not have an adverse impact on market quality or result in undue concentration. Although the Commission recognizes that the Policy, as amended, could result in prohibiting a combination from occurring, the Commission believes the factors for consideration in reviewing the impact of concentration are related to legitimate market quality issues that the NYSE should be permitted to weigh. The proposal should also benefit specialist units, as well as the MPC, because it sets forth the specific factors the MPC must consider when reviewing specialist combinations. The Commission also notes that the MPC denials must be in writing, and must be communicated to the specialist. This will ensure that the basis for any denial is provided to the specialist unit.

The Commission believes that the proposal does not impose any unnecessary or inappropriate burden on competition under Section 6(b)(8) of the Act,[10] in that it establishes review procedures to prevent potential under capitalization of specialist units that could hinder market quality. Accordingly, any potential burden on competition resulting from the proposal is justified as necessary and appropriate under the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[11] that the amended proposed rule change (SR–NYSE–2002–41) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–11589 Filed 5–8–03; 8:45 am]

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[8] In approving the 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)(8).

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47795; File No. SR–PCX–2002–25]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Exchange, Inc. Relating to Elimination of the Lead Market Maker Concentration Level of 15% of the Issues Traded on the Exchange's Options Floor

May 5, 2003.

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 April 22, 2002, the Pacific Exchange, Inc. (''PCX'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. On April 29, 2003, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to eliminate the concentration limit for the number of issues that a Lead Market Maker (''LMM'') on the Exchange may be allocated. Below is the text of the proposed rule change. Proposed new language is *italicized.* Proposed deletions are in [brackets].

* * * * *

Pacific Exchange, Inc. Rules of the Board of Governors

* * * * *

Rule 6.82 (a)–(d)—No change.

(e) Allocation:

(1) *Allocation.* The allocation of option issues to LMMs [shall] *will* be effected by the Options Allocation Committee. The Options Allocation Committee [shall] *will* select that candidate who appears best able to perform the function of an LMM in the designated option issue. Factors to be considered for selection include, but are not limited to, the following: experience with trading the option issue; adequacy of capital; willingness to promote the Exchange as a marketplace; operational capacity; support personnel; history of adherence to Exchange rules and securities laws; trading crowd evaluations made pursuant to [OFPA B–13] *Rule 6.100;* and any other criteria specified in this Rule. *The Options Allocation Committee will also consider the number and quality of issues that have been allocated, reallocated or transferred to a Lead Market Maker.*

(2) *Transfer of Issues.* Issues allocated to an LMM may not be transferred to another firm or between nominees without the express approval of the Options Allocation Committee.

[(3) *Concentration of Issues.* In the absence of extraordinary circumstances, as determined by the Options Allocation Committee, no LMM may be allocated more than fifteen percent (15%) of the

[1] 15 U.S.C. 78s(b)(1)

[2] 17 CFR 240.19b–4.

[3] *See* letter from Mai Shiver, Senior Attorney, Regulatory Policy, PCX, to Nancy Sanow, Assistant Director, Division of Market Regulation, SEC, dated April 28, 2003.

number of issues traded on the Options Floor.]

[(4)] (*3*) *Evaluation of LMMs.* The Options Allocation Committee shall monitor and evaluate the performance of LMMs with regard to quality of markets and shall do so at least semiannually. In reviewing and evaluating an LMM's performance, the Committee will consider, among other things, the LMM's evaluation conducted pursuant to [Options Floor Procedure Advice B–13] *Rule 6.100,* the LMM's compliance with Exchange Rules, including, but not limited to, Rule 6.32 through 6.40 and Article XI, Section 2 of the Exchange Constitution.

* * * * *

Guidelines of the Options Allocation Committee

The Options Allocation Committee has developed a guideline to assist the Committee in its review of matters that affect the level of LMM concentration on the Exchange. The Committee intends to evaluate matters related to the LMM concentration by considering a number of factors, including the number of issues allocated to an LMM and the contract volume in the products allocated to a LMM.

Under the Committee's guidelines, the Committee intends to take into consideration an LMM's level of concentration if there is an event or proposal that would cause an LMM to meet either of the following criteria:

1. The number of issues allocated to an LMM (and any affiliated LMM) is 25% or more of the total number of issues traded on the PCX;

2. The volume in the issues allocated to an LMM (and any affiliated LMM) is 50% or more of the total volume of the PCX or 25% or more of the total volume in equity option issues of the PCX.

If there is an event or proposal that would cause an LMM to reach either of the two above criteria (such as, for example, the allocation to an LMM of additional issues or a proposal involving a transfer of interest in an LMM organization), the Committee will carefully evaluate the level of concentration that would result. If the Committee determines that the event or proposal would result in an unacceptable level of concentration, the Committee could exercise its discretion and take action to lower the resulting level of concentration or to deny the applicable proposal. The Committee retains the discretion to review an LMM's level of concentration at any time regardless of whether the above criteria are satisfied.

* * * * *

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 PCX 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 PCX 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

Current PCX Rule 6.82(e) provides that the allocation of option issues to an LMM is effected by the Options Allocations Committee (''OAC''). Under this rule, the OAC selects the candidate who appears best able to perform the function of an LMM in a particular designated option issue. Factors to be considered for selection include, but are not limited to: experience with trading the option issue; adequacy of capital; willingness to promote the Exchange as a marketplace; operational capacity; support personnel; history of adherence to Exchange rules and securities laws; trading crowd evaluations made pursuant to Options Floor Procedure Advice (''OFPA'') B–13 (renumbered Rule 6.100) [4], and any other criteria specified in Rule 6.82. In addition to the above, the rule provides that in the absence of extraordinary circumstances, as determined by the OAC, the OAC may not allocate more than 15% of the number of issues traded on the Options Floor to any LMM.[5]

The options industry continues to experience a consolidation and withdrawal of liquidity providers and therefore, the Exchange is proposing a rule change that would eliminate the 15% LMM concentration limit and replace it with a provision that would require the OAC to consider the number and quality of issues that it has allocated, reallocated or transferred to an LMM. Consistently, the Exchange seeks to apply a guideline developed by the OAC in order to assist it in its review of matters that affect the level of LMM concentration on the Exchange. The guideline requires the OAC to take into consideration the concentration of an LMM's issues if there is an event or proposal that would cause an LMM to meet either of the following criteria: (i) the number of issues allocated to an LMM (and any affiliated LMM) is 25% or more of the total number of issues traded on the PCX; or (ii) the volume in the issues allocated to an LMM (and any affiliated LMM) is 50% or more of the total volume of the PCX or 25% or more of the total volume in equity option issues of the PCX. If an LMM meets either of the two above criteria, the guideline requires the OAC to evaluate the level of concentration and determine whether the event or proposal would result in an unacceptable level of concentration. If so, the OAC could exercise its discretion and take action to lower the resulting level of concentration or to deny the applicable proposal. Pursuant to the guideline, the OAC will retain the discretion to review an LMM's level of concentration at any time regardless of whether the above criteria are satisfied.

The Exchange believes that the rule change and accompanying guideline are necessary to assure not only that the OAC has the discretion to allocate an issue to the most qualified LMM, but also to maintain a competitive advantage relative to other options exchanges with respect to the number of issues that an LMM may be allocated.[6]

2. Statutory Basis

The Exchange believes that the proposed rule changes are consistent with section 6(b) [7] of the Act, in general, and further the objectives of section 6(b)(5),[8] in particular, in that they are designed to facilitate transactions in securities, to promote just and equitable principles of trade, to enhance competition, to perfect the mechanism of a free and open market and to protect investors and the public interest.

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 that is not

[4] *See* Securities and Exchange Act Release No. 44345 (May 23, 2001), 66 FR 30037 (June 4, 2001).

[5] In 2000, the Commission approved a PCX proposal to increase the cap on the percentage of issues per LMM from 10% to 15%. *See* Securities and Exchange Act Release No. 42583 (March 28, 2000), 65 FR 17689 (April 4, 2000).

[6] The Exchange notes that the Chicago Board Options Exchange (''CBOE'') has a guideline, which dates back to 1999, that has no mandatory cap on the number of issues that may be allocated to a Designated Primary Market-Maker (''DPM''). The CBOE guideline may trigger a review with the relevant committee when, *inter alia,* the number of classes allocated to a DPM is 25% or more of the total number of classes traded on CBOE. *See* CBOE Regulatory Guideline 99–135.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

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

The PCX neither solicited nor received written comments on the proposed rule change.

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 the self-regulatory organization consents, the Commission will:

(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 proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. 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. Copies of such filing will also be available for inspection and copying at the principal office of PCX. All submissions should refer to File No. PCX–2002–25 and should be submitted by May 30, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–11586 Filed 5–8–03; 8:45 am]

BILLING CODE 8010–01–P

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–47794; File No. SR–Phlx–2003–27]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change, and Amendment No. 1 Thereto, by the Philadelphia Stock Exchange, Inc. Relating to the Amendment of Price Criteria for Certain Securities that Underlie Options Traded on the Exchange

May 5, 2003.

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 April 23, 2003, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On April 30, 2003, the Phlx filed Amendment No. 1 to the proposal.[3] The proposed rule change, as amended, has been filed by Phlx as a ''non-controversial'' rule change under Rule 19b–4(f)(6) under the Act.[4] 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 amend Commentary .01 to Phlx Rule 1009 to allow the Exchange to list options series on covered securities, as defined under Section 18(b)(1)(A) of the Securities Act of 1933 (''Covered Securities''),[5] where the closing market price of the underlying Covered Securities was at least $3.00 per share for the five consecutive business days prior to the date that the Phlx submits an option class certification for listing and trading options to the Options Clearing Corporation (''OCC''). The listing criteria will remain the same for non—Covered Securities.

The text of the proposed rule change, as amended, is below. Proposed additions are in *italics* and proposed deletions are in [brackets.]

* * * * *

Rule 1009. Criteria for Underlying Securities

(a) No change.

(b) No change.

(c) No change.

Commentary:

.01 The Board of Governors has established guidelines to be considered by the Exchange in evaluating potential underlying securities for Exchange option transactions. Absent exceptional circumstances with respect to items 1, 2, 3, or 4 listed below, at the time the Exchange selects an underlying security for Exchange options transactions, the following guidelines with respect to the issuer shall be met:

(1) No change.

(2) No change.

(3) No change.

(4) *(i) If the underlying security is a ''covered security'' as defined in Section 18(b)(1)(A) of the Securities Act of 1933, the market price per share of the underlying security has been at least $3.00 for the previous five (5) consecutive business days preceding the date on which the Exchange submits a certificate to the Options Clearing Corporation for listing and trading. For purposes of this rule, the market price of such underlying security is measured by the closing price reported in the primary market in which the underlying security is traded.*

[Either (i)]*(ii) If the underlying security is not a ''covered security,''* the market price per share of the underlying security has been at least $7.50 for the majority of business days during the three calendar months preceding the date of selection, as measured by the lowest closing price reported in any market in which the underlying security traded on each of the subject days or [(ii)](a) the underlying security meets

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Jurij Trypupenko, Counsel and Director of Litigation andOperations, Legal Department, Phlx to Terri Evans, Assistant Director, Division of Market Regulation (''Division''), Commission, dated April 29, 2003 (''Amendment No. 1''). In Amendment No. 1, the Exchange submitted a technical correction by inserting rule text that had been inadvertently omitted in the original filing.

[4] 17 CFR 240.19b–4(f)(6). For purposes of determining the effective date and calculating the sixty-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers that period to commence on April 30, 2003, the date Phlx filed Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

[5] Section 18(b)(1)(A) of the Securities Act of 1933 (the ''1933 Act'') provides that ''[a] security is a covered security if such security is—listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed or authorized for listing on the National Market System of the Nasdaq Stock Market (or any successor to such entities) * * *.'' 15 U.S.C. 77r(b)(1)(A). The term ''Covered Security,'' for the operation of proposed Commentary .01 to Phlx Rule 1009, will not include those securities defined in Section 18(b)(1)(B) of the 1933 Act. 15 U.S.C. 77r(b)(1)(B).