

arguments concerning the foregoing, including whether the proposed rule change, as amended, 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 the NYSE. All submissions should refer to File No. SR-NYSE-2003-10 and should be submitted by May 30, 2003.

#### IV. Commission Findings and Order Granting Accelerated Approval of Proposed Rule Change

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. In particular, the Commission believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,<sup>14</sup> which requires, among other things, that the rules of the Exchange be 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 investors and the public interest.<sup>15</sup>

The Commission believes that the proposal should help the NYSE to maintain a fair and orderly market by enabling the NYSE to test its autoquoting feature without the interruption of NYSE Direct+, which automatically changes the depth of market, as well as the tick and last reported sale in these stocks. In addition, the Commission notes that NYSE has represented that it will notify members at least one week in advance of the implementation date of the pilot.

The Commission finds good cause for accelerating approval of the proposed

rule change and Amendment No. 1 prior to the thirtieth day after publication in the **Federal Register**. The Commission believes that accelerated approval will permit the Exchange, without undue delay, to assess the impact of autoquoting on the Exchange's auction market, particularly with regard to liquidity, continuity, spread, depth, number of trades, and other such variables.

Accordingly, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,<sup>16</sup> to approve the proposed rule change, as amended, prior to the thirtieth day after publication of the notice of filing, on a pilot basis for seven days.

#### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>17</sup> that the proposed rule change, as amended, (File No. SR-NYSE-2003-10) be approved as a one week pilot, on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>18</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47792; File No. SR-NYSE-2002-41]

#### Self-Regulatory Organizations; New York Stock Exchange; Order Approving Proposed Rule Change by the New York Stock Exchange, Inc. Amending the Exchange's Specialist Combination Review Policy in NYSE Rule 123E

May 2, 2003.

#### I. Introduction

On August 29, 2002, the New York Stock Exchange, Inc. ("NYSE" 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 its Specialist Combination Review Policy ("Policy"). On January 27, 2003 the NYSE amended the

proposed rule change.<sup>3</sup> On March 20, 2003, the rule proposal, as amended, was published for comment in the **Federal Register**.<sup>4</sup> The Commission received no comments on the proposal. This order approves the amended proposed rule change.

#### II. Description of the Proposed Rule Change

NYSE Rule 123E sets forth the NYSE's Specialist Combination Review Policy.<sup>5</sup> Currently, the Policy requires the Quality of Markets Committee ("QOMC") to review proposed specialist unit combinations that exceed five, ten, or fifteen percent tier levels in any one of four concentration measures.<sup>6</sup>

The proposed rule change removes the QMOC review requirement for combinations that result in an increase in any concentration measure of less than two percentage points within a tier level. If, however, the percentage change increase results in the unit moving into a higher tier classification, a review will result. The proposed rule change also eliminates capital position requirements for the various tiers in light of recent amendments of other Exchange requirements to Exchange Rules 104.21 and 104.22.<sup>7</sup> The proposed rule change also delegates to the Market Performance Committee ("MPC") the responsibility of reviewing and approving, or disapproving in writing, a specialist combination to see what effect it will have on market quality. Furthermore, the proposed rule change amends the Policy to require that proponents of the combined units

<sup>3</sup> See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated January 24, 2003 ("Amendment No. 1"). In Amendment No. 1 the Exchange provided a new Exhibit A that completely replaced and superseded the proposed rule language in the original filing.

<sup>4</sup> See Securities Exchange Act Release No. 47547 (March 20, 2003), 68 FR 15027 (March 27, 2003).

<sup>5</sup> See Securities Exchange Act Release No. 46579 (October 1, 2002), 67 FR 63004 (October 9, 2002) (SR-NYSE-2002-31) (formal codification as Rule 123E); Securities Exchange Act Release No. 34167 (June 6, 1994), 59 FR 30625 (June 14, 1994) (SR-NYSE-93-45) (permanent pilot approval).

<sup>6</sup> The concentration measures include a specialist unit's share of: (1) Common stocks listed on the Exchange; (2) the 250 most active listed common stocks for the last 12 months; (3) total listed common stock share volume for the last 12 months; and (4) total listed common stock dollar volume for the last 12 months.

<sup>7</sup> See Securities Exchange Act Release No. 43098 (July 31, 2000), 65 FR 49044 (August 10, 2000) (SR-NYSE-99-46). See also Exchange Rule 104.22 that requires any new specialist entities that result from merger, acquisition, consolidation, or other combination of specialist assets to maintain net liquid assets (NLA) equivalent to the greater of either: (1) The aggregate of the NLA of the specialist entities prior to their combination, or (2) the capital requirement prescribed by Rule 104.

<sup>14</sup> 15 U.S.C. 78f(b)(5).

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

<sup>16</sup> 15 U.S.C. 78s(b)(2).

<sup>17</sup> 15 U.S.C. 78s(b)(2).

<sup>18</sup> 17 CFR 200.30-3(a)(12).

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

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

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.<sup>8</sup> Specifically, the Commission finds the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>9</sup> 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,<sup>10</sup> 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,<sup>11</sup> 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.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## 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"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> 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.<sup>3</sup> 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

<sup>8</sup> 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).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> 15 U.S.C. 78f(b)(8).

<sup>11</sup> 15 U.S.C. 78s(b)(2).

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

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

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

<sup>3</sup> See letter from Mai Shiver, Senior Attorney, Regulatory Policy, PCX, to Nancy Sanow, Assistant Director, Division of Market Regulation, SEC, dated April 28, 2003.