

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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47836; File No. SR-NYSE-2003-16]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Changes by the New York Stock Exchange, Inc. Relating to Arbitration

May 12, 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 May 9, 2003, the New York Stock Exchange, Inc. ("NYSE" 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 NYSE. NYSE filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act³ and rule 19b-4(f)(6) thereunder,⁴ which renders the proposal effective upon filing with the Commission. 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 proposed rule change consists of an extension of rule 600(g).

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 NYSE 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 proposed rule change is intended to:

- Extend until September 30, 2003,⁵ rule 600(g) that was approved by the Commission for a six-month period ending May 12, 2003.⁶

The Exchange's statement of purpose is contained in the Commission's Approval Order. In that Approval Order the Commission stated: "The Exchange's Director of Arbitration will monitor the progress of the above described litigation [*NASD Dispute Resolution, Inc. and New York Stock Exchange, Inc. v. Judicial Council of California*, No. C 02 3485 (N.D. Cal.)] and determine whether there is a continuing need for the waiver option."⁷

The above litigation, in which the Exchange and NASD Dispute Resolution, Inc. sought a declaratory judgment that the Ethics Standards for Neutral Arbitrators in Contractual Arbitrations (the "California Standards") are preempted by Federal law, has not been concluded. On November 12, 2002, Judge Samuel Conti dismissed the action on Eleventh Amendment grounds.⁸ A Notice of Appeal from Judge Conti's decision has been filed with the United States Court of Appeals for the Ninth Circuit.⁹ The Exchange's Director of Arbitration has determined that, in the absence of a final judicial determination or legislative resolution of the preemption issue, there is a continuing need for the waiver option.

⁵ The Commission recently approved an extension of a similar pilot rule of the National Association of Securities Dealers, Inc. ("NASD"), contained in its Code of Arbitration Procedure, until September 30, 2003. Release No. 34-47631 (April 3, 2003), 68 FR 17713 (April 10, 2003). By proposing to extend its own pilot rule until September 30, 2003, the Exchange seeks to conform the duration of the NASD and Exchange pilot programs.

⁶ Release No. 34-46816 (November 12, 2002), 67 FR 69793 (November 19, 2002).

⁷ *Id.* at 69794.

⁸ *NASD Dispute Resolution, Inc. v. Judicial Council of California*, 232 F. Supp. 2d 1055 (N.D. Cal. 2002).

⁹ In another case, *Mayo v. Dean Witter Reynolds, Inc., Morgan Stanley Dean Witter & Co. dba Morgan Stanley Dean Witter, and Does 1-50*, No. C-01-20336 JF, 2003 WL 1922963 (N.D. Cal., April 22, 2003), Judge Jeremy Fogel recently held that application of the California Standards to the Exchange and other self-regulatory organizations is preempted by the Act, the comprehensive system of federal regulation of the securities industry established pursuant to the Act, and the Federal Arbitration Act.

2. Statutory Basis

The Exchange states that the proposed changes are consistent with section 6(b)(5) of the Act¹⁰ in that they promote just and equitable principles of trade by ensuring that members and member organizations and the public have a fair and impartial forum for the resolution of their disputes.

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 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 Exchange has 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

The NYSE has stated that because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days (or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest), it has become effective pursuant to section 19(b)(3)(A) of the Act¹¹ and rule 19b-4(f)(6) thereunder.¹² At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further the purposes of the Act.

Pursuant to rule 19b-4(f)(6)(iii) under the Act,¹³ the proposal may not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, and the self-regulatory organization must file notice of its intent to file the proposed rule change at least five business days beforehand. The Exchange has requested that the Commission waive the five-day pre-filing requirement and the 30-day operative delay so that the proposed

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4(f)(6).

¹³ 17 CFR 240.19b-4(f)(6)(iii).

⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

rule change will become immediately effective upon filing.

The Commission believes that waiving the five-day pre-filing provision and the 30-day operative delay is consistent with the protection of investors and the public interest.¹⁴ Waiving the pre-filing requirement and accelerating the operative date will merely extend a pilot program that is designed to provide investors with a mechanism to resolve disputes with broker "dealers. During the period of this extension, the Commission and NYSE will continue to monitor the status of the previously discussed litigation. For these reasons, the Commission designates the proposed rule change as effective and operative immediately.

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. 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. NYSE-2003-16 and should be submitted by June 10, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁵

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Assistant Secretary.

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¹⁴ For purposes of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁵ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47843; File No. SR-PCX-2002-54]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. Relating to a One Tick Step Up Requirement for Auto-Ex in Certain Option Issues

May 13, 2003.

I. Introduction

On August 27, 2002, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt a one-tick step up requirement for market makers who are participating on the Exchange's Automatic Execution System ("Auto-Ex"). On March 19, 2003, the Exchange submitted Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published in the **Federal Register** on April 9, 2003.³ The Commission received no comments regarding the proposal. This order approves the proposed rule change, as amended.

II. Description

The Exchange is proposing to adopt PCX Rule 6.87(e)(8) relating to the Exchange's Auto-Ex System for options trading. Currently, options market makers who are logged on to Auto-Ex are obligated to meet certain requirements with respect to their use of Auto-Ex. These obligations are set forth in PCX Rule 6.87(e)(1)-(7). The Exchange is proposing to adopt a new rule that would require Lead Market Makers ("LMMs") participating on Auto-Ex to step up and execute certain orders at prices better than the Exchange is disseminating under specified conditions.

PCX Rule 6.87(i) currently allows the Options Floor Trading Committee ("OFTC") to require market makers to step up at least one trading increment to the national best bid or offer ("NBBO") for electronic orders in selected issues.⁴

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act No. 47615 (April 2, 2003), 68 FR 17420.

⁴ Further, pursuant to PCX Rule 6.87(i), the OFTC may designate that an order will default for manual representation in the trading crowd if the order would be executed at a price that is more than one trading increment away from the PCX market price.

The proposed rule change would impose an alternative step up requirement on LMMs. Under the proposal, if the OFTC has not exercised its authority to require step up to the NBBO, the Exchange will set the Auto-Ex System to require LMMs to step up and execute trades in selected issues at the NBBO if the LMM is quoting a price within one tick of the NBBO as disseminated by another exchange. If the LMM is quoting a price that is more than one trading increment inferior to the price being disseminated by another options exchange, the order will default for manual representation in the trading crowd.

Proposed PCX Rule 6.87(e)(8) only will apply to non-broker-dealer orders for ten contracts or less in option issues that are ranked in the 120 most actively traded equity options based on the total number of contracts traded nationally for a specified month based on volume as reported by the Options Clearing Corporation. In addition, the rule will only apply to orders in option series that are not designated as LEAPS pursuant to PCX Rule 6.4(e).

The Exchange's determination of whether an equity option ranks in the top 120 most active, nationally-traded issues will be based on volume statistics reported by the Options Clearing Corporation. The Exchange's determination of whether an equity option ranks in the top 120 most active issues will be based on volume statistics for the three calendar months of trading activity beginning four months prior to the current month. The Exchange has represented that it intends to notify its Members of the issues that are designated to be in the top 120 via a regulatory bulletin that will be published at the beginning of each month.

III. Discussion

After careful consideration, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange. In particular the Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act,⁵ which requires among other things, that the Exchange's rules be designed to promote just and equitable principles of trade, to remove impediments and to perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the

⁵ 15 U.S.C. 78f(b)(5).