system and department at projected levels of registration activity.

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

The NASD does not believe that the proposed rule change 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

The NASD has neither solicited nor received comments on the proposed rule change.

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

The foregoing rule change, which establishes or changes a due, fee, or other charge, has become effective pursuant to Section 19(b)(3)(A) of the Act [14] and subparagraph (e)(2) of Rule 19b–4 thereunder.[15]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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, N.W., Washington, D.C. 20549. 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 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 at the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–98–77 and should be submitted by November 18, 1998.

For the Commission, by the Division of Market Regulations, pursuant to delegated authority.[16]

[FR Doc. 98–28849 Filed 10–27–98; 8:45 am]

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[14] 15 U.S.A. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(e)(2).

[16] 17 CFR 200.30–3(as)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40577, File No. SR–PSE–97–02]

Self-Regulatory Organizations; Order Approving a Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendments 1 and 2 to the Proposed Rule Change by the Pacific Exchange, Inc., Relating to the Proprietary Hand-Held Terminal Program for Floor Brokers

October 20, 1998.

I. Introduction

On January 17, 1997, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') [1] filed a proposed rule change with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] to adopt Rule 6.89 governing the use by PCX Members and Member Organizations (''Members'') of proprietary brokerage order routing terminals (''Terminals'') on the options floor of the Exchange. On March 30, 1998, and June 5, 1998, respectively, the Exchange filed Amendments 1 [4] and 2 [5] with the Commission.

Notice of the proposal was published for comment and appeared in the **Federal Register** on February 18, 1997.[6] Two comment letters were received on the proposed rule change.[7] The PCX responded to IB's comment letter.[8] This order approves the Exchange's proposal, including Amendments No. 1 and 2 on an accelerated basis.

II. Description of the Proposal

The Exchange proposes to adopt rules governing Terminals that Members may use on the options floor of the Exchange. The rules include specific provisions on Exchange approval of

[1] The Exchange changed its name from the Pacific Stock Exchange to the PCX subsequent to the filing of this proposed rule change. For record-keeping purposes the file number will remain SR–PSE–97–02.

[2] 15 U.S.C. 78s(b)(1).

[3] 17 CFR 240.19b–4.

[4] *See* Letter from Michael D. Pierson, Senior Attorney, Regulatory Policy, PCX, to David Sieradzki, Attorney, Division of Market Regulation (''Division''), Commission, dated March 27, 1998 (''Amendment No. 1''). In Amendment No. 1, the Exchange makes three substantive changes to the proposal. First, the Exchange states that approval to use Terminals on the floor of the Exchange will not be granted on an issue by issue basis. Instead, the Exchange will approve the use of any Terminal system that does not interfere with any Exchange-sponsored hand-held terminals, POETS, or any other equipment on the floor. Subject to those conditions, once the Exchange has approved a Member or Member Firm to use a Terminal, the approval is not restricted to particular options trading crowds. Second, the Exchange amends the market making restriction in Section 4(d)(3) to make the definition of market making consistent with the definition of market making in PCX's Exchange-sponsored hand-held terminal filing (SR–PCX–97–28) and Section 3(a)(38) of the Act. *See* Securities Exchange Act Release No. 39970 (May 7, 1998), 63 FR 26662 (May 13, 1998) and 15 U.S.C. 78c(a)(38). Third, the Exchange removes provisions designating the proposal as a pilot program. finally, the Exchange modifies the format of the proposal so that it will be a change to the text of the Rules of the Exchange, rather than a written policy.

[5] *See* Letter from Michael D. Pierson, Senior Attorney, Regulatory Policy, PCX, to David Sieradzki, Attorney, Division, commission, dated June 3, 1998 (''Amendment No. 2''). Amendment No. 2 makes one non-substantive change to the text of the Rule, removing a reference to the fact that the Exchange intends to roll out its own brokerage order routing system. In addition, the Exchange clarified, through an internal cross-reference, that any decision to terminate approval for a Terminal system under PCX rule 6.89(g) would be based on the factors set forth in PCX rule 6.89(b).

[6] *See* Securities Exchange Act Release No. 38270 (February 11, 1997), 62 FR 7286 (February 18, 1997).

[7] Letter from Earl H. Nemser, Managing Director, Interactive Brokers, LLC (''IB''), to Jonathan G. Katz, Secretary, Commission, dated March 11, 1997; letter from Earl H. Nemser, The Timber Hill Group, LLC (''Timber Hill''), to Chairman Levitt, Commissioners Hunt, Unger, Carey and Johnson, Commission, dated June 8, 1998. In further support of its March 11 comment letter, on August 15, 1997, IB supplemented its comment letter with a working paper entitled ''Affirmative Obligations of Market Makers: An Idea Whose Time Has Passed?'' Letter from Bradford L. Jacobowitz, General Counsel, IB, to Jonathan G. Katz, Secretary, Commission, dated August 14, 1997.

[8] Letter from Michael D. Pierson, Senior Attorney, Regulatory Policy, PCX, to Jonathan G. Katz, Secretary, Commission, dated April 21, 1997.

Terminals; restrictions on Members' use of Terminals; exchange inspection and audit; exchange liability; and termination of exchange approval.

Exchange Approval

Proposed Rule 6.89 specifies that Members must obtain prior Exchange approval to use any proprietary brokerage order routing terminals on the options floor. Once the Exchange grants approval to a Member to use Terminals, the Member may do so in all trading crowds. To request such approval, Members must submit a letter of application to the Exchange specifying the make, model number, functions, and intended use of the equipment, and must also provide additional information upon the request of the Exchange. The rule further provides that the format of any orders to be transmitted over the Terminals must also be pre-approved by the Exchange.

PCX Rule 6.89(b) states that, in considering the approval of an application, as well as whether a previously issued approval should be withdrawn, the Exchange will take into account such factors as: (1) the physical size of the Terminal; (2) space available at the post where the Terminal is to be used; (3) telecommunication, electrical and radio frequency requirements; (4) Terminal characteristics and capacity; and (5) any factors that the Exchange considers relevant in the interest of maintaining fair and orderly markets, the orderly and efficient conduct of Exchange business, the maintenance and enhancement of competition, the ability of the Exchange to conduct surveillance of the use of the Terminal and the business transmitted through it, the adequacy of applicable audit trails, and the ability of the Terminal to interface with other Exchange facilities.

PCX Rule 6.89(c) provides that Members must report to the Exchange every proposed material change in functionality of a Terminal and every proposed change in the use of a Terminal. It further provides that Members must not implement any such proposed changes unless and until they have been approved by the Exchange, and that Members must also promptly file with the Exchange supplements to their applications whenever the information currently on file becomes inaccurate or incomplete for any reason.

Restrictions on Use of Terminals

PCX Rule 6.89(d) sets forth four restrictions applicable to Members' use of Terminals on the options floor. The first restriction is that Members may receive brokerage orders in the trading crowd via Terminals, but must represent such orders in the trading crowd by open outcry in a manner that is consistent with Exchange rules.

The second restriction states that when a Member executes an order that was received over a Terminal, the Member must fill out and time stamp a trading ticket within one minute of the execution. Exchange rules on record keeping and trade reporting are unchanged.

The third restriction states that Terminals may be used to receive brokerage orders only, and that Terminals may not be used to perform a market making function. it states that any system used by a Member to operate a Terminal must be separate and distinct from any system that may be used by a member or any person associated with a Member in connection with market making functions. It further states that, for the purpose of this subsection, orders initiated from off the floor of the Exchange that are not counted as ''Market Maker transactions'' within the meaning of PCX Rule 6.32 and that do not constitute a Member, on a regular and continuous basis, simultaneously representing orders to buy and sell options contracts in the same series for the account of the same beneficial holder shall not be deemed to be a market making function.

The Exchange believes that if Terminals were permitted to be used to perform market making functions from off the floor of the Exchange, it may become undesirable for Exchange market makers to continue to assume the costs and obligations associated with being a registered market maker, which in turn could harm the liquidity and quality of the Exchange's market. The Exchange is particularly concerned that off-floor market making effectively would establish a market making structure devoid of affirmative market making obligations that could result in less deep and liquid markets during periods of market stress, when off-floor Terminal market makers would not be required to continue making markets. Moreover, the Exchange believes that surveillance of market making through the Terminals currently would be particularly difficult.

The Exchange intends to interpret the term ''market making'' in accordance with its traditional definition as defined under the Act, *i.e.*, holding one's self out as being willing to buy and sell a particular security on a regular or continuous basis.[9] The definition of market making would not capture parties who enter orders on one side of the market, nor would it capture parties who enter two-sided limit orders on occasion. A party would not be deemed to be engaging in market making unless it regularly or continuously holds itself out as willing to buy and sell securities.

The fourth restriction in PCX Rule 6.89(d)(4) states that no Member or any person associated with a Member may use for the benefit of such Member or any person associated with such Member information about any brokerage order in the Terminal system until that information has been disclosed to the trading crowd. Accordingly, prior to acting on information displayed on a Terminal by placing an order or making or changing a bid or offer on the Exchange or in any other securities or futures market to the benefit of the Member, the Member must disclose information displayed on a Terminal to the trading crowd. The Exchange believes that this restriction will help to ensure that Members using Terminals trade on the same terms and conditions as other market participants and do not receive any trading advantages such as the ability to interact with orders transmitted through the Terminals without first disclosing those orders to the trading crowd.

Inspection and Audit

PCX Rule 6.89(e) states that the operation and use of all aspects of the Terminal and all orders entered through the Terminal are subject to inspection and audit by the Exchange at any time upon reasonable notice. It further provides that Members must furnish to the Exchange such information concerning the Terminal as the Exchange may from time to time request upon reasonable notice, including without limitation an audit trail identifying transmission, receipt, entry, execution, and reporting of all orders. For the purpose of this subsection, a notice of at least twenty-four hours shall be deemed to be reasonable (however, shorter periods may be provided in appropriate circumstances).

Exchange Liability

PCX Rule 6.89(f) states that neither the Exchange nor its directors, officers, employees or agents shall be liable to a member, a Member's employees, a Member's customers or any other person for any loss, damage, cost, expense or liability arising from the installation, operation, relocation, use of, or inability to use a Terminal on the floor of the Exchange (including any failure, malfunction, delay, suspension, interruption, or termination).

[9] *See* 15 U.S.C. 78c(a)(38).

Termination of Approval

PCX Rule 6.89(g) provides that the Exchange may at any time determine to terminate approvals for the installation and use by Members of Terminals on the floor of the Exchange or at particular trading posts, as long as the Exchange gives 30 days notice to such Member(s). However, any such decision to terminate its approval of the installation or use of Terminals on the floor of the Exchange must be based on certain specified factors.[10] It further provides that a Member's approval to use a Terminal may also be summarily terminated by the Exchange, once notice has been provided to the affected Member, if: (1) any statement by such Member in its application or any supplement thereto is inaccurate or incomplete; (2) such Member has failed to comply with any provision of this Rule; or (3) the operation of the Terminal is causing operational difficulties on the floor of the Exchange, and the Member has failed to cure the same within seven calendar days following the giving of notice (or such shorter period of time as the Exchange may deem appropriate if it determines the circumstances have created a situation requiring a shorter period). It states that Members must immediately stop using their Terminals and must remove such Terminals from the floor of the Exchange upon the termination of approval pursuant to this subsection, and that nothing in this subsection shall be construed as a waiver of or limitation upon whatever right Members may otherwise have to seek appropriate relief pursuant to PCX Rule 11.[11]

In its filing, the Exchange noted that, except in certain minor respects, the proposed Rule is similar to an approved rule change of the Chicago Board Options Exchange (''CBOE'') relating to the use of proprietary brokerage order routing terminals on the CBOE floor.[12]

III. Summary of Comments

A. IB Comment Letter

In its comment letter, IB expressed support for the proposal's aim to introduce Terminals to the options floor, but objected for several reasons to the Exchange prohibiting a Terminal from being used to transmit two-sided orders. IB requested that the Commission, pursuant to the National Securities Markets Improvement Act of 1996 (''NSMIA''), ''use its * * * exemptive powers and supervisory authority over the [Exchange] to * * * modify the proposed rule to eliminate unreasonable restrictions * * * and then to direct its implementation forthwith.''

First, IB argued that Section 105 of NSMIA permits the Commission to provide an exemption in order to permit the immediate use of hand-held technology on the PCX options floor, without imposing the restrictions suggested by the PCX proposal. Second, IB argued that the Exchange's proposal must be rejected because it does not sufficiently analyze the proposal's impact on efficiency and competition as required by Section 106 of NSMIA. Third, IB argued that a floor-wide prohibition on the use of Terminals for two-sided orders would place an unreasonable burden on competition. IB noted that, in proposing its market making restriction, the Exchange improperly relied on the Commission's approval of the CBOE proposal relating to Terminals used by the SPX options trading crowd. IB believes that approval of the restriction for that one options class should not act as a precedent for a floor-wide policy as proposed by PCX, and should be re-examined by the Commission. In particular, IB noted the important differences in the liquidity of the SPX option and the various PCX products. Fourth, IB argued that the proposed restrictions on two-sided orders must be rejected because the Exchange did not appropriately assess whether the restriction's resulting burden on competition was justified as reasonable and appropriate, and whether the public interest could otherwise be protected by a more competitive alternative. Fifth, IB argued that the use of Terminals for two-sided orders would not deprive market makers of the advantages afforded to them and would not discourage them from meeting their market making obligations. IB noted that it believes that as new products are listed on the various exchanges, market makers will have the financial incentive to continue to make markets. In addition, IB noted that if the Exchange restricts the use of Terminals to transmit two-sided orders to the trading floor, the liquidity of the markets and the investing public will suffer during periods of market stress. Sixth, IB argued that the Exchange should have considered less restrictive alternatives such as requiring non-market makers who use Terminals for the submission of two-sided orders to assume market maker obligations through the use of Terminals. Seventh, IB argued that the Exchange should not be (1) permitted to limit the use of proprietary Terminals when it implements its own brokerage order routing system; or (2) deny the use of Terminals summarily,[13] or on an ''issue-by-issue'' basis without setting out an objective standard.[14] IB noted that to develop a proprietary order routing system requires a large capital investment. Further, IB believes that by denying the use of Terminals in this manner, the Exchange discourages development of better systems, deprives the public of the benefits of market efficiencies created by new technology, is inconsistent with Commission policy to encourage development of innovative trading systems and services, and has not been shown to justify the resulting burdens on competition. Finally, IB argued that the PCX proposal unnecessarily mandates the manual writing and time stamping of paper tickets. IB noted that it believes that an electronic audit trail is more accurate and more efficient than paper tickets and more consistent with Commission policy and NSMIA.

B. PCX Response Letter

The PCX response to IB's comment letter stated that without the market making restriction, an off-floor market maker could avoid all affirmative market making obligations and have significant trading advantages over on-floor market makers. Among other things, on-floor market makers are required to: (1) trade with public customers at the disseminated best bid or offer,[15] (2) maintain fair and orderly markets,[16] (3) maintain price continuity by dealing from their own accounts under certain circumstances,[17] and (4) log on to the Exchange's Auto-Ex system when circumstances warrant it. In this context, the Exchange notes that if a market maker had the freedom to leave

[10] These factors include the physical size of the terminal, space available at the post where the Terminal is to be used, telecommunication, electrical and radio frequency requirements, and Terminal characteristics and capacity. *See* Amendment No. 1, *supra* note 4.

[11] PCX Rule 11.7 provides due process protections for persons who have been aggrieved by Exchange action. It gives such persons an opportunity to be heard and to have the complaint reviewed by the Exchange.

[12] *See* Securities Exchange Act Release No. 38054 (December 16, 1996), 61 FR 67365 (December 20, 1996). The Commission notes that the CBOE proposal authorized the use of hand-held order routing terminals in the S&P 500 (''SPX'') crowd to trade SPX options only. The current PCX filing concernsthe use of Terminals on a floor-wide basis.

[13] The Commission notes that a member would have the right to appeal any decision to deny approval to use a Terminal or suspend a member from using a Terminal pursuant to PCX Rule 11.7, *Hearings and Review of Committee Action.*

[14] *See infra* note 31.

[15] *See* PCX Rule 6.86.

[16] *See* PCX Rule 6.37(a).

[17] *See* PCX Rule 6.37(b).

the floor and perform market making through a Terminal, many would do so to avoid the obligations of being a market maker. This could ultimately result in a significant reduction of liquidity on the Exchange's options trading floor. Accordingly, the Exchange believe IB's proposal would compromise the continued viability of its markets.

Next, the Exchange contends that allowing off-floor market making would, in effect, create an entirely new category of floor trader. The Exchange notes that the IB proposal to allow off-floor market making was never presented to the Options Floor Trading Committee for approval. The Exchange also requests that, if the Commission does approve IB's proposal, that the Commission do so uniformly across options exchanges to prevent one exchange from being at a competitive disadvantage to another.

The Exchange also addresses IB's contention that the Exchange unjustifiably relies on the Commission's prior approval of a similar CBOE filing that included a market making restriction because the prior proposal dealt with heavily traded issues while the trading volume on the PCX is considerably smaller. The Exchange states that ''the question of whether Terminals should initially be permitted in trading crowds with low volume or trading crowds with high volume should be left to the discretion of the [Options Floor Trading Committee], which is in the best position to make such a determination because of its diverse composition of industry representatives.''

The Exchange makes several arguments in response to IB's request that the Commission ''uses its * * * exemptive powers and supervisory authority over the [Exchange] to * * * modify the proposed rule to eliminate unreasonable restrictions. First, the Exchange argues that Congress has not indicated that Section 105 of NSMIA should be used in the manner that IB suggests. The Exchange believes that Congress intended that Section 105 be used to allow the exchanges to use automated trading systems without filing a proposed rule change or that the exemption refers to the Commission's ability to exempt certain electronic trading systems from having to be registered under the Act as national securities exchanges. Second, the Exchange argues that even if Section 105 were to apply, IB has failed to meet the statutory requirements that the exemption be ''necessary or appropriate in the public interest'' and ''consistent with the protection of investors'' because, among other things, it could undermine the Exchange's market making system and result in less deep and liquid markets. The Exchange also believes that surveillance would be particularly difficult and that IB has not met the burden under NSMIA that the exemption be necessary or appropriate because IB still has the choice of putting a market maker in the trading crowd. Third, the Exchange notes that the Commission has yet to use its exemptive authority under Section 105 and recommends that the Commission use caution before doing so. Fourth, the Exchange believes that the Commission has previously engaged in a ''rigorous'' analysis of the issues in this matter. Specifically, the Commission has previously considered comment letters and responses in connection with similar rule filings of the American Stock Exchange and the CBOE. Fifth, in response to IB's argument that the Exchange should not be permitted to limit the use of proprietary Terminals when it implements its own brokerage order routing system, the Exchange states that ''as long as an applicant's proprietary trading system does not cause operational problems on the trading floor, the applicant will not be arbitrarily denied the privilege of operating its Terminals on the floor[.]'' Finally, with regard to IB's objection that written, time-stamped tickets would be required under the rules relating to Terminals, the Exchange notes that such tickets are needed, at this time, not only for audit trail purposes, but also for purposes of verifying compared trades and reconciling uncompared trades.

C. Timber Hill Comment Letter

In its comment letter, Timber Hill urges the Commission to consider the issue of prohibiting the use of Terminals to perform a market making function. Timber Hill asserts that, due to the impact of the proposed market making restriction on competition and the use of technology, NSMIA requires that the restriction must be supported by an actual basis in fact, and not merely by possibilities derived from an outdated theoretical construct. Further, Timber Hill argues that the Commission should not rely on its prior approval of a similar market making restriction in a proposal by the CBOE without reanalyzing the issue in light of NSMIA.

IV. Commission Finding and Conclusions

Section 6(b)(5) of the Act [18] requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principals of trade, remove impediments to and perfect the mechanism of a free and open market, and in general to protect investors and the public interest. Section 6(b)(7) of the Act [19] requires that the rules of an Exchange be in accordance with Section 6(d) of the Act,[20] and in general provide a fair procedure for the disciplining of members and the prohibition or limitation by an exchange of a person's access to services offered by the exchange. Section 6(b)(8) of the Act [21] requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Section 11A(a)(1)(C)(ii) of the Act [22] states that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure fair competition among brokers and dealers. For the reasons set forth below, 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, and, in particular, the requirements of Sections 6(b)(5), 6(b)(7), 6(b)(8), and 11A(a)(1)(C) of the Act.[23]

The Commission believes that the PCX's proposal should foster coordination with persons engaged in facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market, and protect investors and the public interest by expediting and making more efficient the process by which members can receive and execute options orders on the floor of the Exchange. Because Terminals will be allowed to be used by all brokers and dealers in all trading crowds, provided that they comply with the terms and conditions as set forth in the proposal, the proposal also will promote fair competition among brokers and dealers and facilitate transactions in

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78f(b)(7).

[20] 15 U.S.C. 78f(d). Section 6(d) of the Act, among other things, requires that an exchange, in any proceeding to determine whether a member should be disciplined, bring specific charges, notify such member of and provide him with an opportunity to defend himself against such charges, and keep a record. *Id.*

[21] 15 U.S.C. 78f(b)(8).

[22] 15 U.S.C. 78k–1(a)(1)(C).

[23] 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. 78f(b). As discussed below, the proposed rule will likely expedite and make more efficient the process by which members can receive and execute options orders on the floor of the Exchange. In addition, the Commission discusses the proposed rule's effect on competition below.

options on the Exchange. Finally, although IB and Timber Hill have set forth a number of objections to the market making restriction, for the reasons discussed below, the Commission believes that these objections have been adequately addressed and finds that the market making restriction is consistent with the Act.

As described above, PCX Rule 6.89(d)(3) provides that no floor broker may knowingly use a Terminal, on a regular and continuous basis, to simultaneously represent orders to buy and sell options contracts in the same series for the account of the same beneficial holder. The Rule further provides that if the Exchange determines that a person or entity has been sending, on a regular and continuous basis, orders to simultaneously buy and sell option contracts in the same series for the account of the same beneficial holder, the Exchange may prohibit orders for the account of such person or entity from being sent through the Exchange's Member Firm Interface (''MFI'')[24] for such period of time as the Exchange deems appropriate.

The Commission finds that the market making restriction is consistent with the Act for the following reasons. The Commission believes that the PCX's restriction on market making through the use of Terminals has been effected in a clear and reasonable manner that is not ambiguous or overbroad, and that takes into account regulatory and market impact concerns, including those relating to quote competition and price discovery.[25] Notably, the Exchange's proposal does not bar all two-sided limit orders. Instead it only restricts the acceptance of two-sided limit orders placed by the same beneficial holder in the performance of a market making function. The distinction between market making and brokerage activity is well established among market participants. Moreover, the language of PCX Rule 6.89(d)(3) expressly restricts a floor broker from, on a regular and continuous basis, simultaneously representing orders to buy and sell options contracts in the same series for the account of the same beneficial holder, not the occasional entry of two-sided limit orders. This definition of market making activity is consistent with the definition of market maker under the Act, which states that a market maker ''holds himself out as being willing to buy and sell [a] security for his own account on a regular or continuous basis.''[26] Thus, the market making restriction on Terminal use for routing limit orders is the minimum necessary for the Exchange to ensure that Terminals are not used for off-floor market making.

IB alleges that the market making restriction places an unreasonable burden on competition. As the Commission has previously stated in approving market making restrictions similar to that being adopted by PCX, the Commission does not believe it unreasonable for a market to determine that the introduction of unregulated market making through Terminals may undermine its market maker system and potentially create disincentives for market makers to remain on an exchange trading floor.[27] Accordingly, any burden on competition that arguably exists from PCX's restriction on using Terminals for market making is, in the Commission's view, justified as reasonable and appropriate to ensure adequate regulation of the PCX market.[28]

The Commission also does not believe that restricting market making activity through Terminals constitutes an unreasonable restriction on the introduction of new technology onto the floor of the Exchange in violation of NSMIA, as alleged in the IB and Timber Hill Comment Letters. The Commission believes that it is within the business judgment of an Exchange to determine the manner in which new technologies are introduced onto its trading floor provided that the limitations do not constitute an unreasonable burden on competition and are otherwise consistent with the Act.

In addition, the Commission has considered the impact of the Exchange's market making restriction on efficiency and competition. While the proposal may impose a burden on competition by limiting how Terminals may be used on the floor, the Commission does not believe such burden to be unreasonable. As discussed above, the Commission believes that the PCX's restriction on market making through the use of Terminals has been effected in a clear and reasonable manner that is neither ambiguous nor overbroad, and that takes into account regulatory and market impact concerns. Further, the Commission notes that the impact on competition of the current proposal is limited by the fact that the Exchange's own hand-held order routing terminal program was approved by the Commission with an identical market making restriction.[29] In response to IB's request that the Commission use its exemptive authority under Section 105 of NSMIA to permit the use of Terminals for market making, the Commission agrees with the Exchange that Congress did not intend that Section 105 be used in the manner that IB suggests. Section 105 of NSMIA states that the Commission ''by rule, regulation, or order may conditionally or unconditionally exempt any person, security, or transaction, * * * from any provision or provisions of this title or of any rule or regulation thereunder[.]''[30] The rules IB requests relief from are the rules of the PCX, not the Act or rules or regulations under the Act. Accordingly, the Commission does not believe that it is appropriate to grant the relief IB requests under Section 105 of NSMIA.

Further, the Commission believes the PCX has adequately addressed the other issues raised by IB. First, PCX has amended its proposal so that under PCX Rule 6.89(g), termination of the Exchange's approval of Terminals can only occur under certain specified circumstances, rather than without cause.[31] In addition, while the Exchange has retained the right to summarily terminate its approval of a member's Terminal use, such summary action can also only be taken under certain

[24] The MFI is an electronic order delivery and reporting system that allows member firms to route orders for execution by the automatic execution feature of POETS as well as to route limit orders to the Options Public Limit Order Book. Orders that do not reach those two destinations are defaulted to a member firm booth. MFI also provides member firms with instant confirmation of transactions to their systems. Member firms may access POETS by establishing an MFI mainframe-to-mainframe connection.

[25] *Cf.*, Securities Exchange Act Release No. 25842 (June 23, 1988), 53 FR 24539 (approving certain restrictions on the use of telephones on the floor of the New York Stock Exchange), *aff'd per curiam*, 866 F.2d 47 (2d Cir. 1989).

[26] 15 U.S.C. 78c(a)(38).

[27] *See* Securities Exchange Act Release No. 38054 (December 16, 1996), 61 FR 67365 (December 20, 1996)(order approving SR–CBOE–95–48).

[28] While the Commission recognizes that, as IB contends, there may be ways to address the regulatory issues presented by off-floor market making through the use of floor broker hand-held terminals, the Act does not dictate that any particular approach be taken. The Commission believes that the manner in which the Exchange has chosen to address the regulatory issues presented by off-floor market making reflects the considered judgment of the PCX regarding the attributes of Exchange membership and the organization of its trading floor, and is a fair exercise of its powers as a national securities exchange.

[29] *See* Securities Exchange Act Release No. 39970 (May 7, 1998), 63 FR 26662 (May 13, 1998) (order approving SR–PCX–97–28).

[30] P.L. 104–290; 110 Stat. 3416.

[31] The Commission notes that the Exchange, in Amendment No. 1 to the proposed rule change, sets forth objective standards on which the decision to terminate an approval to use Terminals would be based and stating that approval to use Terminals would be given on a floor-wide, rather than on an issue-by-issue basis. *See* Amendment No. 1, *supra* note 4.

circumstances.[32] Further, upon either type of termination action, the PCX proposal provides certain appeal rights of the termination decision. The Commission believes that the appeal procedures ensure adequate due process for termination under PCX Rule 6.89, consistent with Sections 6(b)(7)[33] and 6(d)[34] of the Act. In this regard, we note that a member aggrieved by an Exchange decision to terminate its prior terminal approval could seek relief pursuant to PCX Rule 11. These provisions provide specific procedures to seek Exchange hearing and review for persons aggrieved by actions of the Exchange including terminating or enforcing the terms of PCX Rule 6.89.[35]

With respect to the use of written order tickets, the Exchange has represented that such tickets are needed, at this time, not only for audit trail purposes, but also for purposes of verifying compared trades and reconciling uncompared trades. The Commission believes that it is reasonable for the Exchange to require the use of written order tickets for those purposes.

In conclusion, the Commission believes that the proposed rule will make the process by which members can receive approval for using Terminals more transparent and fair. In addition, the use of Terminals should also make options trading on the floor of the Exchange more efficient. Finally, for the reasons stated above, the Commission believes that the market making prohibition on the use of the Terminals adequately balances the potential benefits to be derived from the use of Terminals with the regulatory issues that are raised in connection with the potential use of Terminals for market making.

The Commission finds good cause for approving Amendments 1 and 2 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Amendment No. 1 changes the language in proposed Commentary .02 to Rule 6.67 to indicate that orders received through proprietary hand held terminals will be considered to be in writing for the purposes of PCX Rule 6.67. Commentary .02, as originally proposed, applied only to Exchange-Sponsored Terminals. Amendment No. 1 ensures that all hand-held terminal systems, regardless of whether they are Exchange sponsored or proprietary will have the same regulatory requirements. Amendment No. 2 clarifies the proposal to indicate, through an internal cross-reference, what factors the Exchange will consider when determining whether or not to revoke approval for the use of a terminal. As a result, the Commission does not believe that Amendments 1 and 2 raise any new regulatory issues. Accordingly, the Commission believes there is good cause, consistent with Sections 6(b)(5) and 19(b)(2)[36] of the Act, to approve Amendments 1 and 2 to the Exchange's proposal on an accelerated basis.

V. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendments 1 and 2 including whether the amendments are consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. 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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to File No. SR–PSE–97–02 and should be submitted by November 18, 1998.

In view of the above, the Commission finds that the proposal is reasonable and is consistent with the Act, and, in particular, Sections 6(b)(5), 6(b)(7), 6(b)(8), and 11A(a)(1)(C)(ii) of the Act.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[36] that the proposed rule change (File No. SR–PSE–97–02) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[37]

[FR Doc. 98–28850 Filed 10–27–98; 8:45 am]

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[32] Under PCX Rule 6.89(g), the Exchange can summarily terminate approval of the use of Terminals when (1) a statement in the Member's application is inaccurate or incomplete; (2) such Member has failed to comply with any provision of PCX Rule 6.89; and (3) the operation of the Terminal causes operational difficulties on the floor of the Exchange. *See* Amendment No. 1, *supra* note 4.

[33] 15 U.S.C. 78f(b)(7).

[34] 15 U.S.C. 78f(d).

[35] *See supra* note 13.

[36] 15 U.S.C. 78f(b)(5) and 78s(b)(2).

[36] 15 U.S.C. 78s(b)(2).

[37] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new, and/or currently approved information collection.

DATES: Comments should be submitted on or before December 28, 1998.

FOR FURTHER INFORMATION CONTACT: Curtis B. Rich, Management Analyst, Small Business Administration, 409 3rd Street, SW, Suite 5000, Washington, DC 20416. Phone Number: 202–205–6629.

SUPPLEMENTARY INFORMATION:

Title: ''Marketing Data Form''.

Type of Request: New Collection.

Form No: 2079.

Description of Respondents: U.S. Small Businesses.

Annual Responses: 25.

Annual Burden: 42.

Comments: Send all comments regarding this information collection to, Tanya Galery-Smith, Export Development Specialist, Office of International Trade, Small Business Administration, 409 3rd Street SW, Suite 8000, Washington, DC 20416. Phone No: 202–205–7268.

Send comments regarding whether this information collection is necessary for the proper performance of the function of the agency, accuracy of burden estimate, in addition to ways to minimize this estimate, and ways to enhance the quality.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. 98–28846 Filed 10–27–98; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3138]

State of Alabama; Amendment #2

In accordance with information received from the Federal Emergency Management Agency, the above-numbered Declaration is hereby amended to include Choctaw and