

the Exchange were executed by participants other than the PMM.

The Commission does not believe that the small order participation right for PMMs (*i.e.*, five contracts of fewer preference) will necessarily result in a significant portion of the Exchange's volume being executed by the PMM, especially in light of the fact that the PMM executes against such orders only if it is quoting at the best price, and only for the number of contracts associated with its quotation. In order to provide a safeguard against the potential for increased PMM executions in the future in excess of the proposed 40% threshold, however, the ISE agrees to continue to maintain the technological capability to compile the sort of data it provided to the Commission during the pilot period and pilot extension, and agrees to compile and provide such data to the Commission at its request.¹⁵ The Commission further notes that the Exchange will continue to evaluate periodically the percentage of the volume executed on the Exchange that is comprised of orders for five contracts or fewer executed by primary market makers, and will reduce the size of the orders included in this provision if such percentage is over 40 percent. Given the existence of these continued safeguards, as well as the lack of anticompetitive statistical trends observed by the Commission during the pilot period and pilot extension, the Commission finds that the proposed rule change is consistent with Section 6(b)(5).

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The original filing proposing the ISE's pilot program for small order participation right for PMMs was subject to a full notice and comment period.¹⁶ In addition, this proposal requesting permanent approval of the same provision will, as of the date of this order, have been subject to a full notice and comment period and no comment letters were received by the Commission. Moreover, the one-year pilot period and related reporting obligations by ISE were responsive to the issues raised by commenters to ISE's earlier filing regarding its allocation algorithm.¹⁷ Accordingly, the Commission finds good cause for approving the proposed rule change

(SR-ISE-2001-17) prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁸ that the proposed rule change (SR-ISE-2001-17) is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44637; File No. SR-PCX-2001-26]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Exchange, Inc., Relating to Accepting Orders from Professional Customers

August 1, 2001.

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 July 6, 2001, 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. 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 PCX proposes to allow PCX Floor Brokers and qualified Floor Clerks of Floor Brokers to accept offers from "Professional Customers" (as defined) for execution on the Exchange's trading floor. The text of the proposed rule change is below. Additions are in italics.

* * * * *

¶ 4963 Options Floor Broker Defined Rule 6.43(a)—No change.

(b) Conducting a Limited Public Business

(1) Notwithstanding the provisions of subsection (a) of this Rule, qualified

Floor Brokers and Floor Clerks of qualified Floor Brokers may conduct a public business limited to accepting orders directly from Professional Customers, as defined below, for execution on the Floor of the Exchange. Any Floor Broker or Floor Clerk of a Floor Broker seeking to conduct such a limited public business must first:

(A) successfully complete the Series 7 Examination or the Series 7A Examination; and

(B) register and receive approval from the Exchange. The form of registration will be prescribed by the Exchange.

(2) For purposes of this rule, a "Professional Customer" includes a bank; trust company; insurance company; investment trust; a state or political subdivision thereof, charitable or nonprofit educational institution regulated under the laws of the United States, or any state, or pension or profit sharing plan subject to ERISA or of any agency of the United States as of a state or political subdivision thereof, or any person (other than a natural person) who has, or who has under management, net tangible assets of at least sixteen million dollars.

(3) Members who conduct a limited public business pursuant to the provisions of subsection (b) of this Rule 6.43 are strictly prohibited from holding customer funds and/or customer securities.

* * * * *

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 Exchange 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 Exchange proposes to adopt the requirement that qualified Floor Brokers and Floor Clerks located on the floor of the PCX who wish to accept orders directly from professional investors for execution on the trading floor must take and pass either the Series 7 or Series

¹⁵ Telephone conversation between Katherine Simmons, Vice President and Associate General Counsel, ISE, Deborah Flynn, Assistant Director, Division of Market Regulation, Commission and Geoffrey, Pemble, Attorney, Division of Market Regulation, Commission, on July 25, 2001.

¹⁶ See Release No. 42808, *Supra* note 4.

¹⁷ *Id.*

¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

7A³ examinations. Currently, PCX Rule 6.43 states that an Exchange Floor Broker may only accept and execute option orders received from members and "shall not accept an order from any source unless he has registered his individual membership for a member organization approved to transact business with the public in accordance with Rule 9 * * *." The PCX now seeks to amend this rule to allow qualified Floor Brokers and Floor Clerks of qualified Floor Brokers to conduct a public business limited to accepting orders directly from professional customers without meeting the extensive requirements set forth in PCX Rule 9.⁴ The PCX believes that the limited scope of this business, combined with the sophistication of such "Professional Customers," with respect to option transactions, serves to alleviate some of the regulatory concerns addressed in PCX Rule 9.⁵ PCX Rule 9 was implemented in order to provide protections for retail public customers who undertake to transact business on the Exchange. The regulatory concerns related to customer protection are reduced, under the proposed rule, due to the fact that members seeking to conduct such a limited public business will be strictly prohibited from holding customer funds and/or securities. Members will only be allowed to accept orders, immediately execute such orders and transmit the orders to a clearing member. The rule change, as proposed, would allow a Floor Clerk of a qualified Floor Member to accept orders from "Professional Customers" for execution on the Exchange's trading floor, so long as the Floor Clerk has successfully completed either the series 7 Examination or the Series 7A Examination. The New York

³ The Exchange will use the Series 7A Examination that was approved in Securities Exchange Act Release No. 34334 (July 29, 1993) 58 FR 41539 (SR-NYSE-3-10). These examinations will be administered by the National Association of Securities Dealers, Inc. ("NASD").

⁴ The proposed rule defines the term "professional customer" to include a bank; trust company; insurance company; investment trust; a state or political subdivision thereof; charitable or nonprofit educational institution regulated under the laws of the United States, or any state, or pension or profit sharing plan subject to ERISA or of any agency of the United States as of a state or political subdivision thereof; or any person (other than a natural person) who has, or who has under management, net tangible asset of a least sixteen million dollars. See also Securities Exchange Act Release No. 43062 (July 21, 2000), 65 FR 46745 (July 31, 2000).

⁵ Some of these concerns include: (a) Maintenance of customer records, (b) account supervision, (c) calculation of customer reserves as prescribed by the SEC, (d) maintenance of books and records as required by the SEC and (e) advertisements and sales literature.

Stock Exchange, Inc.⁶ and the Chicago Stock Exchange, Inc.⁷ have adopted similar rules to permit execution of "Professional Customer orders. The proposed rule would also require members seeking to conduct such a limited public business to register with and receive approval from the Exchange. The requirements established under this rule will be phase-in so as to minimize the burden placed on Exchange Membership.⁸

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b)⁹ of the Act, in general, and furthers the objectives of Section 6(b)(5),¹⁰ in particular, in that it is designed to promote just and equitable principles of trade, prevent fraudulent and manipulative acts and practices, and 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 necessary or appropriate in furtherance of the purposes of the Act.

⁶ See Securities Exchange Act No. 34334 (July 8, 1994) FR 35964 (SR-NYSE-94-13) (Order approving rule change relating to interpretation to rule 345 establishing a new category of limited registration for floor clerks, and the content outline for the examination module for floor clerks of members engaged in public business with professional customers). See also Securities Exchange Act Release No. 42092 (November 2, 1999) 64 FR 61375 (SR-NYSE-99-36) (Order approving proposed rule change to eliminate the Series 7B qualification examination and adopt a new interpretation to rule 345) (Establishing Series 7A as the appropriate examination for conducting business with professional customers).

⁷ See Securities Exchange Act No. 37690 (September 17, 1996) 61 FR 49803 (SR-CHX-96-11) (Order granting approval to proposed rule change relating to examinations). See also Securities Exchange Act No. 43062 (July 21, 2000) 65 FR 46754 (SR-CHX-00-07) (Order approving proposed rule change by the Chicago Stock Exchange, Inc. relating to examination requirements for floor clerks who may accept orders from professional customers for execution on the exchange's trading floor).

⁸ The Exchange will phase-in these new requirements over a designated period of time after the proposed rule change has been approved. This will provide persons subject to the exam with an opportunity to study for and take the new examination without unnecessary business disruption. Members must successfully complete these examination requirements within 180 days of the date that the SEC approves the proposed rule.

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the PCX 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, N.W., Washington, D.C. 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. 52, 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 Exchange. All submissions should refer to file number SR-PCX-2001-26, and should be submitted by August 29, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland,

Deputy Secretary.

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¹¹ 17 CFR 200.30-3(a)(12).