

19(b)(3)(A) of the Act⁸ and Rule 19b-4(f)(6) thereunder.⁹

A proposed rule change filed under Rule 19b-4(f)(6)¹⁰ does not become operative until 30 days after the date of filing or such shorter time as the Commission may designate if such action is consistent with the protection of investors and the public interest. The PCX has requested that the Commission accelerate the implementation of this proposed rule change so that it may take effect before the 30-day period specified in Rule 19b-4(f)(6)(iii).¹¹ The Commission believes that it is consistent with the protection of investors and the public interest to waive the 30-day period and to designate that the proposed rule change has become operative as of January 27, 2003, the date the PCX filed the proposal with the Commission.¹²

At any time within 60 days after the filing of the proposed rule change, the Commission may summarily abrogate the 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 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 the PCX. All submissions should refer to File No.

SR-PCX-2003-01 and should be submitted by March 20, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47378; File No. SR-PCX-2002-20]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 by the Pacific Exchange, Inc. Relating to a Stay of a Committee Action

February 19, 2003.

I. Introduction

On April 9, 2002, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC"), 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 an interim stay provision in connection with its rules regarding review of committee actions. On December 31, 2002, PCX filed Amendment No. 1 to the proposed rule change.³ The proposed rule change and Amendment No. 1 were published for comment in the **Federal Register** on January 15, 2003.⁴ No comment letters were received on the proposal, as amended. This order approves the proposed rule change and Amendment No. 1.

II. Description of the Proposal

The Exchange's Board of Governors delegates certain powers and duties to committees that administer the provisions of the Constitution and the Rules of the Exchange.⁵ The rules of the Exchange provide that persons aggrieved by committee decisions (other than disciplinary matters) may seek review of the decisions subject to the procedural prerequisite of PCX Rule 11.7 (Hearing and Review of Committee Action). PCX represents that, while the rule does not expressly provide a right to interim relief from committee

decisions, applicants seeking such relief routinely request that the Exchange stay further action pending review. In the absence of an express policy or procedures relating to interim relief, the Exchange has evaluated the merits of stay applications on a case-by-case basis relying upon the guidelines that are used by the Commission in reviewing stay applications of self-regulatory organization actions.⁶ As a consequence of the Exchange's *ad hoc* review, the Exchange believes that applicants are either not aware that they have a right to interim relief or they are not familiar with the criteria that they must satisfy to obtain a stay.

The Exchange proposed to set forth the criteria and procedures necessary to request a stay of committee action. The proposed new Exchange rule will set forth four factors that the Exchange will consider when evaluating the merits of a stay application: (1) Whether there is a likelihood that the applicant will prevail on the merits of the appeal; (2) that without a stay, the applicant is likely to suffer irreparable injury; (3) that it is likely there will not be substantial harm to other parties if the stay is granted; and (4) that the issuance of a stay is likely to serve the interests of the Exchange or an identified public interest.⁷ The Exchange represents that the applicant must prove each of these factors based solely on the evidence and information presented in the application for a stay.

The proposed new Exchange rule will also clarify the procedures that an applicant must satisfy in seeking a stay. The proposed rule specifies that an applicant must pay a \$500 fee in order to request a stay. The fee will be used to cover a portion of Exchange expenses including the allocation of staff time in processing a request for a stay. The proposal also provides that applicants must request a stay by the earlier of ten business days after a committee renders its decision or forty-eight hours before the committee implements action. From time to time, the Exchange represents that it may be required to implement a particular committee decision immediately without leaving sufficient time for an aggrieved party to request a stay of action. According to the Exchange, this situation occurs, for example, when the Exchange must identify a particular Lead Market Maker to trade a new option on the following

⁸ 15 U.S.C. 78s(b)(3)(A).

⁹ 17 CFR 240.19b-4(f)(6).

¹⁰ *Id.*

¹¹ 17 CFR 240.19b-4(f)(6)(iii).

¹² The Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation for the sole purpose of accelerating the operative date of the proposed rule change. 15 U.S.C. 78c(f).

¹³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaced the PCX's original 19b-4 filing in its entirety.

⁴ Securities Exchange Act Release No. 47143 (January 8, 2003), 68 FR 2096.

⁵ See PCX Rule 11.4.

⁶ See 17 CFR 201.401(d); see also Order Preliminarily Considering Whether to Issue Stay *Sua Sponte* and Establishing Guidelines for Seeking Stay Applications, Securities Exchange Act Release No. 33870 (April 7, 1994) ("Commission Order").

⁷ The Exchange represents that it relies on the Commission's guidelines in proposing these factors.

business day, or when the Options Floor Trading Committee makes *ad hoc* trading decisions on the trading floor regarding Auto-Ex decisions pursuant to PCX Rule 6.87. In those unique situations, the Exchange notes that the aggrieved party will not have an opportunity to stay the action, but will be able to appeal the committee decision pursuant to PCX Rule 11.7. The Exchange also represents that it will not be required to consider a request for a stay made within the forty-eight hours before a committee implements action.

The proposed new Exchange rule will also provide that the Exchange's Board Appeals Committee may render a decision summarily based solely on the documents submitted in support of, and opposition to, the request for stay. In the event that the Board Appeals Committee denies the request for a stay, the Board Appeals Committee will state the reasons for its denial and state facts that support its decision.⁸ The Exchange believes that these procedures will guide applicants through the stay process and will provide the Exchange's Board Appeals Committee with a uniform standard by which to judge the merits of an application for interim relief. The proposed new Exchange rule will not apply to disciplinary matters and will not affect an aggrieved person's underlying right to appeal a committee decision.

III. Discussion

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations promulgated thereunder applicable to a national securities exchange and, in particular, with the requirements of Section 6(b).⁹ Specifically, the Commission finds that approval of the proposed rule change, as amended, is consistent with Section 6(b)(5)¹⁰ of the Act in that it is designed to facilitate transactions in securities; 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 a national market system; and in general, to protect investors and the public interest. In addition, the Commission finds that approval of the proposed rule change, as amended, is consistent with Section 6(b)(4) of the Act¹¹ because it provides for the equitable allocation of reasonable dues, fees and other charges among members, issuers and other persons.

The Exchange proposes to amend Exchange Rule 11.7 to explicitly codify criteria and procedures necessary to request a stay of committee action so that applicants are aware that they have a right to interim relief from committee decisions and to provide applicants with clear guidelines on how to request a stay. The Commission believes that the criteria proposed by the Exchange for evaluating the merits of a stay application, as described above, are similar to criteria that the Commission uses to access requests for stays in connection with petitions seeking review of a Commission order.¹²

The Exchange proposes that applicants must request a stay by the earlier of ten business days after a committee renders its decision or forty-eight hours before the committee implements action. The Commission notes that the Exchange has represented that, at the time of the committee's decision, the applicant will be notified of the date when the committee will implement its action and will therefore be able to assess when he or she would need to file an application to request a stay.¹³ In addition, the Exchange represents that it will not be required to consider a request for a stay made within the forty-eight hours before a committee implements action. The Commission recognizes that, under certain circumstances, such as when the Exchange's Options Floor Trading Committee need to make *ad hoc* trading decisions on the trading floor regarding the Exchange's Auto-Ex system, it would be necessary for the committee to take immediate action following a committee decision. In such cases, a request for interim relief from the committee's decision would be

impractical. The Exchange has represented, however, that the applicant would have a right to appeal the decision pursuant to Exchange Rule 11.7.

The Exchange's proposal further permits its Board Appeals Committee to render its decision summarily based solely on the documents submitted in support of, and opposition to, the request for stay, and not on the underlying complaint. The Commission notes that the Exchange has represented that its Board Appeals Committee will notify the applicant if his or her request for a stay is denied and will provide the applicant with the grounds for such denial.

Consequently, the Commission believes that the Exchange's proposed criteria to request a stay of a committee action are clear and that they provide objective and uniform guidelines for applicants. The Commission finds that proposed guidelines for requesting a stay are consistent with the Act.

In addition, the Commission believes that requiring all applicants to pay a \$500 fee to request a stay of committee action is appropriate because it covers the expense for the Exchange to process the applicant's application, and because it applies to all applicants uniformly regardless of whether the request for a stay is accepted or denied.

IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with sections 6(b)(5)¹⁴ and 6(b)(4).¹⁵

It is therefore ordered, pursuant to section 19(b)(2) of the Act,¹⁶ that the proposed rule change (SR-PCX-2002-20) and Amendment No. 1 are approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Margaret H. McFarland,
Deputy Secretary.

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⁸ The Exchange represents that the Board Appeals Committee will notify the applicant of its denial of a request for a stay, as well as the reasons for its denial. Telephone conversation between Mai S. Shiver, Senior Attorney, Regulatory Policy, PCX, and Sapna C. Patel, Attorney, Division of Market Regulation ("Division"), Commission, on January 8, 2003.

⁹ 15 U.S.C. 78f(b). In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ 15 U.S.C. 78f(b)(4).

¹² See Section 25(c)(2) of the Act, 15 U.S.C. 78y(c)(2), and the Commission's Rules of Practice Rule 401, 17 CFR 201.401(d); see also Commission Order, *supra* note 6.

¹³ Telephone conversation between Mai S. Shiver, Senior Attorney, Regulatory Policy, PCX, and Sapna C. Patel, Attorney, Division, Commission, on February 19, 2003.

¹⁴ 15 U.S.C. 78f(b)(5).

¹⁵ 15 U.S.C. 78f(b)(4).

¹⁶ 15 U.S.C. 78s(b)(2).

¹⁷ 17 CFR 200.30-3(a)(12).