

quantities at each price, which in turn would result in fewer automatic executions. The Commission believes that the proposed rule change may help to alleviate this concern by eliminating the pending auto-stop function. The Commission believes that the removal of this provision will help to ensure that demand for automatic execution continues to be satisfied.

The Commission believes that the proposal is consistent with the protection of investors and the public interest and therefore finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The proposed rule change is designed to permit the Exchange to continue, with a minimum of disruption to trading operations, its transition to quoting in decimals, which began in all Exchange listed securities on January 29, 2001, and is scheduled to begin in certain Nasdaq securities on March 12, 2001. In addition, the Commission notes that the proposed rule change is being approved on a pilot basis only, through July 9, 2001. In light of these factors, the Commission finds good cause to approve the proposed rule change on an accelerated basis.

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 submissions, 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 filings will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to the File No. SR-CHX-01-03 and should be submitted by March 19, 2001.

V. Conclusion

It is Therefore Ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-CHX-01-03) is approved through July 9, 2001.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01-4596 Filed 2-23-01; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43973; File No. SR-NASD-99-42]

Self-Regulatory Organizations; Order Approving a Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Relating to Performance Fee Arrangements

February 15, 2001.

I. Introduction

On September 2, 1999, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly owned subsidiary, NASD Regulation, Inc. ("NASD Regulation"), submitted to the Securities and Exchange Commission ("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 relating to performance fee arrangements.

The **Federal Register** published the proposed rule change for comment on July 21, 2000.³ The Commission received no comments on the proposed rule change. On January 31, 2001, the Association submitted an amendment to the proposed rule change.⁴ This order approves the proposed rule change and grants accelerated approval to Amendment No. 1. The Commission is also soliciting comment on Amendment No. 1 to the proposed rule change.

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 43030 (July 12, 2000), 65 FR 45414.

⁴ Letter from Alden S. Adkins, Senior Vice President and General Counsel, NASD Regulation, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated January 30, 2001 ("Amendment No. 1"). Amendment No. 1 amends NASD Rule 2330(f)(2) to clarify that the rule applies to members or persons associated with members that act as investment advisers, whether or not registered as such, and to add a cross-reference to Rule 205-3 of the Investment Advisers Act of 1940 ("Advisers Act"). Amendment No. 1 also states that NASD Regulation will notify its members of amendments to Rule 205-3 within 90 days through a Notice to Members.

II. Description of the Proposed Rule Change

NASD Rule 2330(f) prohibits members and persons associated with members from sharing in customer account profits and gains except under certain conditions. Subparagraph (f)(1)(A) permits sharing in customer account profits and gains where the firm has authorized it and the sharing is proportionate to the member's or associated person's contributions to the account. Subparagraph (f)(2) permits, under certain conditions, members or registered representatives to charge a performance fee (an advisory fee based on a percentage of the capital gains or capital appreciation of an account). Currently, NASD Rule 2330(f)(2) permits the receipts of a performance fee only if: (i) The member or associated person reasonably believes that the customer account meets certain minimum net worth (\$1,000,000) or amount invested (\$500,000) requirements; (ii) the member or associated person obtains the prior written authorization of the arrangement from the member carrying the account; (iii) the member or associated person reasonably believes that the customer is able to understand the compensation arrangement and its risks; (iv) the compensation agreement is in writing; (v) the member or associated person reasonably believes that the agreement is an arm's length agreement; (vi) the compensation formula takes into account realized and accrued gains and losses over a period of at least one year; and (vii) the member discloses all material information relating to the agreement, including method of compensation and potential conflicts of interest.

According to NASD Regulation, the requirements of NASD Rule 2330(f)(2) have always closely tracked the requirements of Rule 205-3 under the Advisers Act. However, effective August 20, 1998, the Commission amended Rule 205-3 to provide greater flexibility in structuring performance fee arrangements with clients who are financially sophisticated or have the resources to obtain sophisticated financial advice regarding these arrangements.⁵ Because the NASD had incorporated the requirements of Rule 205-3 into NASD Rule 2330(f)(2), when the Commission amended Rule 205-3, NASD Rule 2330(f)(2) was no longer consistent with Rule 205-3.

In order to restore consistency, the proposed rule change would permit members and their associated persons

⁵ See Investment Advisers Act Release No. 1731 (July 15, 1998), 63 FR 39022 (July 21, 1998).

that act as investment advisers to share in customer account profits and gains subject to the provisions of Rule 205-3 under the Advisers Act. The NASD amended Rule 2330(f)(2), to eliminate the conditions set forth in the rule and to incorporate the terms of Rule 205-3, as may be amended from time to time. The NASD stated that this approach represents a decision by the Board to incorporate whatever performance-based standard the Commission may adopt from time to time.⁶ Thus, in the future, the proposed rule will conform to any subsequent amendments to Rule 205-3 in a Notice to Members within 90 days of the amendment.⁷

III. Discussion

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 association,⁸ and, in particular, the requirements of Section 15A(b)(6) of the Act.⁹ The Commission believes that proposed rule change should continue to ensure that NASD members enter into performance fee arrangements only with clients who are financially sophisticated or have the resources to obtain sophisticated financial advice regarding performance fee arrangements. The Commission also believes that cross-referencing Advisers Act Rule 205-3, rather than duplicating the specific provisions of Rule 205-3 in NASD Rule 2330(f)(2), will ensure that NASD Rule 2330(f)(2) remains consistent with Advisers Act Rule 205-3. The Commission notes that otherwise, NASD members acting as investment advisers might be subject to conflicting rules on the same subject. Finally, the Commission believes that NASD Regulation's commitment to issue a Notice to Members within 90 days of any amendments to Advisers Act Rule 205-3 should ensure that members remain aware of the requirements for performance fee arrangements.

The Commission finds good cause for approving Amendment No. 1 to the proposed rule change prior to the thirtieth day after publication in the **Federal Register**. The Commission notes

that Amendment No. 1 clarifies that the proposal applies to members acting as investment advisers and cross-references Advisers Act Rule 205-3. The Commission believes that Amendment No. 1 will make the requirements of NASD Rule 2330(f)(2) more clear and, therefore, should help to ensure that members comply with the rule. Accordingly, the Commission finds good cause to accelerate approval of Amendment No. 1 to the proposed rule change, consistent with Sections 15A(b)(6)¹⁰ and 19(b)¹¹ of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 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 NASD. All submissions should refer to the File No. SR-NASD-99-42 and should be submitted by March 19, 2001.

V. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹² that the amended proposed rule change (SR-NASD-99-42) is approved.

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. 34-43975; File No. SR-PCX-00-27]

Self-Regulatory Organizations; Order Approving a Proposed Rule Change by the Pacific Exchange, Inc. Relating to Options Trade Reporting

February 16, 2001.

I. Introduction

On August 5, 2000, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("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 relating to the reporting of options transactions. The proposed rule change was published for comment in the **Federal Register** on November 8, 2000.³ The Commission received no comments on the proposal. This order approves the proposal.

II. Description of the Proposal

The PCX proposes to adopt new PCX Rule 6.69(a) to require all Exchange members and member organizations who are required to report trades either directly to the Options Price Reporting Authority ("OPRA") or to another party responsible for reporting trades to OPRA, to immediately report all trades to the Exchange for dissemination to OPRA within 90 seconds.

Currently, Commentary .01 to Exchange Rule 6.69 states that trades must be immediately reported at the time of execution. The Exchange proposes to require immediate trade reporting, and in any event, no later than 90 seconds following execution. The Exchange also proposes to amend PCX Rule 10.13 to include violations of proposed Rule 6.69(a) in the Exchange's minor Rule Plan.

III. Discussion

The Commission finds that the proposal is consistent with the requirements of the Act.⁴ In particular, the Commission finds that the proposed rule change furthers the objectives of Section 6(b)(5),⁵ in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and

⁶ Telephone conversation between Alden S. Adkins, Senior Vice President and General Counsel, NASD Regulation, and Katherine A. England, Assistant Director, Commission (October 27, 2000).

⁷ See Amendment No. 1, *supra* note 4.

⁸ In approving the proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁹ 15 U.S.C. 78o-3(b)(6).

¹⁰ 15 U.S.C. 78o-3(b)(6).

¹¹ 15 U.S.C. 78s(b).

¹² 15 U.S.C. 78s(b)(2).

¹³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 43505 (November 1, 2000), 65 FR 67030.

⁴ In approving this rule, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁵ 15 U.S.C. 78f(b)(5).