

against the 2,000 share offer at 20 $\frac{1}{4}$. Under the current rule, no portion of the buy percentage order would be elected, and no additional portion of the sell percentage order would be elected. Under the proposed rule change, 1,000 shares of the buy percentage order would be elected at 20 $\frac{1}{4}$, and would then trade with the remaining 1,000 share balance of the offer at 20 $\frac{1}{4}$. No portion of the sell percentage order would be elected.

The conversion process. Under the Rule, the specialist may convert a percentage order into a "live" limit order on a destabilizing tick where: (i) The transaction for which the order is being converted is for 10,000 shares or more; and (ii) the price at which the converted percentage order is to be executed is no more than $\frac{1}{4}$ point away from the last sale price; provided, however, that this price parameter may be modified, in appropriate cases, with the prior approval of a Floor Official and the written consent of the broker who entered the order.²

Proposed change to the conversion process. The Exchange is proposing to amend the Rule to permit the specialist to convert a percentage order on a destabilizing tick, as otherwise permitted by the rule, when the transaction is 10,000 shares or more or represents a quantity of stock having a market value of \$500,000 or more (whichever is less).

This amendment will make the size of permitted transactions consistent with the definition of a block in NYSE Rule 97, and thus facilitate conversion of percentage orders in stocks where the size of the trade has the appropriate market value to qualify as a block transaction, but may not have a share size of 10,000 or more.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)³ that an Exchange have rules that are designed to promote just and equitable principles of trade, 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. This proposed rule change will remove impediments to and perfect the mechanism of a free and

open market by increasing opportunities for percentage orders' participation in the Exchange's auction when a percentage order may be elected by the execution of a previously elected portion of a percentage order on the opposite side of the market. In addition, increasing the opportunity for percentage orders to be converted based on a transaction size or market value will promote liquidity and depth in the market place.

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

Within 35 days of the 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 self-regulatory organization consents, the Commission will:

(A) By order approve the 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. 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

Section, 450 Fifth Street, N.W., Washington, D.C. 20549. 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 No. SR-NYSE-97-09 and should be submitted by June 11, 1997.

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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-38638; File No. SR-NYSE-97-07]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Amendments to Rule 440A ("Telephone Solicitation-Recordkeeping") and an Interpretation to Rule 472 ("Communications with the Public")

May 14, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ Notice is hereby given that on March 18, 1997, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to grant accelerated approval of the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange has filed an amendment to Rule 440A ("Telephone Solicitation-Recordkeeping") which is substantially similar to applicable provisions of the Federal Trade Commission rules adopted pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"),² together with an interpretation of Rule 472 ("Communications with the Public")

² For a more detailed description of the procedures under which a percentage order may be converted on a destabilizing tick, see Securities Exchange Act Release No. 24505 (May 22, 1987), 52 FR 20484 (June 1, 1987) (order approving amendment to Rule 123A.30 to permit the conversion of percentage orders on destabilizing ticks).

³ 15 U.S.C. 78f(b)(5).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 6101-08.

requiring telemarketing scripts to be retained for three years.

The text of the proposed rule change is available at the Office of the Secretary, NYSE, and at the Commission.

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 self-regulatory organization 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 self-regulatory organization 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

Pursuant to the Telephone Consumer Protection Act ("TCPA"),³ the NYSE adopted in June 1995 a "cold call" rule⁴ that paralleled one of the rules of the Federal Communications Commission ("FCC Rules")⁵ and requires persons

³ 47 U.S.C. 227.

⁴ Under the "cold call" rule, each NYSE member who engages in telephone solicitation to market its products and services is required to make and maintain a centralized do-not-call list of persons who do not wish to receive telephone solicitations from such member or its associated persons. Securities Exchange Act Release No. 35821 (June 7, 1995), 60 FR 31337 (approving File No. SR-NYSE-95-11).

The NASD, the MSRB, the CBOE, the Amex, and the PSE also adopted similar rules. See Securities Exchange Act Release Nos. 35831 (June 9, 1995), 60 FR 31527 (approving File No. SR-NASD-96-28); 38053 (Dec. 16, 1996), 61 FR 68078 (Dec. 26, 1996) (approving File No. SR-MSRB-96-06); 36588 (Dec. 13, 1995), 60 FR 56624 (approving File No. SR-CBOE-95-63); 36748 (Jan. 19, 1996), 61 FR 2556 (approving File No. SR-AMEX-96-01); and 37897 (Oct. 30, 1996), 61 FR 57937 (approving File No. SR-PSE-96-32).

⁵ Pursuant to the TCPA, the FCC adopted rules in December 1992 that, among other things, (1) prohibit cold-calls to residential telephone customers before 8 a.m. or after 9 p.m. (local time at the called party's location) and (2) require persons or entities engaging in cold-calling to institute procedures for maintaining a "do-not-call" list that included, at a minimum, (a) a written policy for maintaining the do-not-call list, (b) training personnel in the existence and use thereof, (c) recording a consumer's name and telephone number on the do-not-call list at the time the request not to receive calls is made, and retaining such information on the do-not-call list for a period of at least ten years, and (d) requiring telephone solicitors to provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made and a telephone number or address at which such

who engage in telephone solicitations to sell products and services ("telemarketers") to establish and maintain a list of persons who have requested that they not be contacted by the caller ("do-not-call list").

Under the Telemarketing Act, which became law in August 1994,⁶ the Federal Trade Commission adopted detailed regulations ("FTC Rules")⁷ to prohibit deceptive and abusive telemarketing acts and practices; the regulations became effective on December 31, 1995.⁸ The FTC Rules, among other things, (i) Require the maintenance of "do-not-call" lists and procedures, (ii) prohibit certain abusive, annoying, or harassing telemarketing calls, (iii) prohibit telemarketing calls before 8 a.m. or after 9 p.m., (iv) require a tele-marketer to identify himself or herself, the company he or she works for, and the purpose of the call, and (v) require express written authorization or other verifiable authorization from the customer before the firm may use negotiable instruments called "demand drafts."⁹

Under the Telemarketing Act, the SEC is required either to promulgate or to require the SROs to promulgate rules substantially similar to the FTC Rules, unless the SEC determines either that the rules are not necessary or appropriate for the protection of investors or the maintenance of orderly markets, or that existing federal securities laws or SEC rules already provide for such protection.¹⁰ The

person or entity maybe contacted. 57 FR 48333 (codified at 47 CFR 64.1200). With certain limited exceptions, the FCC Rules apply to all residential telephone solicitations, including those relating to securities transactions. *Id.* While the FCC rules are applicable to brokers that engage in telephone solicitation to market their products and services, those regulations cannot be enforced by either the SEC or the securities self-regulatory organizations ("SROs")

⁶ Telemarketing, *supra* note 2.

⁷ 16 CFR 310.

⁸ §§ 310.3-4 of FTC Rules.

⁹ *Id.* Pursuant to the Telemarketing Act, the FTC Rules do not apply to brokers, dealers, and other securities industry professionals. Section 3(d)(2)(A) of the Telemarketing Act.

A "demand draft" is used to obtain funds from a customer's bank account without that person's signature on a negotiable instrument. The customer provides a potential payee with bank account identification information that permits the payee to create a piece of paper that will be processed like a check, including the words "signature on file" or "signature pre-approved" in the location where the customer's signature normally appears.

¹⁰ In response, the NASD and MSRB have adopted rules to curb abusive telemarketing practices. See Securities Exchange Act Release Nos. 38009 (Dec. 2, 1996), 61 FR 65625 (Dec. 13, 1996) (order approving File No. SR-NASD-96-28) and 38053 (Dec. 16, 1996) 61 FR 68078 (Dec. 26, 1996) (order approving File No. SR-MSRB-96-06).

The Commission has determined that the NASD Rule and MSRB Rule, together with the Exchange

purpose of the proposed rule change is to amend NYSE Rule 440A and the NYSE interpretation to Rule 472 in response to the Commission's request that major self-regulatory organizations ("SROs") promulgate rules substantially similar to applicable provisions of the Federal Trade Commission rules adopted pursuant to the Telemarketing Act.

Time Limitations and Disclosure

The proposed rule change amends Rule 440A to prohibit, under proposed paragraph (a) To Rule 440A, a member, allied member, or employee of a member or member organization from making outbound telephone calls to a member of the public's residence for the purpose of soliciting the purchase of securities or related services at any time other than between 8 a.m. and 9 p.m. local time at the called person's location and to require, under proposed paragraph (b) to Rule 440A, such member, allied member or employee of a member or member organization to promptly disclose to the called person in a clear and conspicuous manner the caller's identity and firm, the telephone number or address at which the caller may be contacted, and that the purpose of the call is to solicit the purchase of securities or related services.

Proposed paragraph (c) to Rule 440A creates exemptions from the time-of-day and disclosure requirements of paragraphs (a) and (b) for telephone calls by any persons associated with a member or member organization, or other associated persons acting at the direction of such persons for the purposes of maintaining and servicing existing customers assigned to or under the control of the associated persons, to certain categories of "existing customers." Paragraph (c) defines "existing customer" as a customer for whom the broker or dealer, or clearing broker or dealer on behalf of the broker or dealer, carries an account. Proposed subparagraph (c)(1) exempts calls, by an associated person, to an existing customer who, within the preceding twelve months, has effected a securities

Act and the Investment Advisers Act of 1940, the rules thereunder, and the other rules of the SROs, satisfy the requirements of the Telemarketing Act, because the applicable provisions of such laws and rules are substantially similar to the FTC Rules except for those FTC Rules that involve areas already extensively regulated by existing securities laws or regulations or activities inapplicable to securities transactions. Securities Exchange Act Release No. 38480 (Apr. 7, 1996), 62 FR 18666 (Apr. 16, 1996). Accordingly, the Commission has determined that no additional rulemaking is required by it under the Telemarketing Act. *Id.* Notwithstanding this determination, the Commission still expects the remaining SROs to file similar proposals.

transaction in, or made a deposit of funds or securities into, an account under the control of or assigned to the associated person at the time of the transaction or deposit. Proposed subparagraph (c)(2) exempts calls, by an associated person, to an existing customer who, at any time, has effected a securities transaction in, or made a deposit of funds or securities into an account under the control of or assigned to the associated person at the time of the transaction or deposit, as long as the customer's account has earned interest or dividend income during the preceding twelve months. Each of these exemptions also permits calls by other associated persons acting at the direction of an associated person who is assigned to or controlling the account. Proposed paragraph (c)(3) exempts telephone calls to a broker or dealer. The proposed rule change also expressly clarifies that the scope of this rule is limited to the telemarketing calls described herein; the terms of the Rule do not otherwise expressly or by implication impose on members any additional requirements with respect to the relationship between a member and a customer or between a person associated with a member and a customer.

Demand Draft Authorization and Recordkeeping

Proposed paragraph (e) prohibits members or persons associated with a member from obtaining from a customer or submitting for payment a check, draft, or other form of negotiable paper drawn on a customer's checking, savings, share, or similar account ("demand draft") without that person's express written authorization, which may include the customer's signature on the instrument, and to require the retention of such authorization for a period of three years. The proposal also states that this provision shall not, however, require maintenance of copies of negotiable instruments signed by customers.

Telemarketing Scripts

The proposed rule change also amends the definition of "sales literature" contained in the interpretation to Rule 472 to include "telemarketing scripts" within that definition. This will require telemarketing scripts to be retained for a period of three years.

2. Statutory Basis

The basis under the Act for the proposed rule change is the requirement under Section 6(b)(5) that an Exchange have rules that are designed to promote

just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

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

The proposed rule change will impose no burden on competition.

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

No written comments were solicited or received with respect to the proposed rule change.¹¹

III. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

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, with Section 6(b) (5) of the Act¹² which requires, among other things, that the rules of the exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.¹³ The proposed rule change is consistent with these objectives in that it imposes time restriction and disclosure requirements, with certain exceptions, on members' telemarketing calls, requires verifiable authorization from a customer for demand drafts, and prevents members from engaging in certain deceptive and abusive telemarketing acts and practices while allowing for legitimate telemarketing activities.

The Commission believes that the amendments to Rule 440A, prohibiting a member or person associated with a member from making outbound telephone calls to the residence of any person for the purpose of soliciting the

purchase of securities or related services at any time other than between 8 a.m. and 9 p.m. local time at the called person's location, without the prior consent of the person, is appropriate. The Commission notes that, by restricting the times during which a member or person associated with a member may call a residence, the proposal furthers the interest of the public and provides for the protection of investors by preventing members and member organizations from engaging in unacceptable practices, such as persistently calling members of the public at unreasonable hours of the day and night.

The Commission also believes that the amendments to Rule 440A, requiring a member or person associated with a member to promptly disclose to the called person in a clear and conspicuous manner the caller's identity and firm, telephone number or address at which the caller may be contacted, and that the purpose of the call is to solicit the purchase of securities or related services, is appropriate. By requiring the caller to identify himself or herself and the purpose of the call, the Rule assists in the prevention of fraudulent and manipulative acts and practices by providing investors with information necessary to make an informed decision when purchasing securities. Moreover, by requiring the associated person to identify the firm for which he or she works and the telephone number or address at which the caller may be contacted, the Rule encourages responsible use of the telephone to market securities.

The Commission also believes that Rule 440A, creating exemptions from the time-of-day and disclosure requirements for telephone calls by associated persons, or other associated persons acting at the direction of such persons, to certain categories of "existing customers" is appropriate. The Commission believes it is appropriate to create an exemption for calls to customers with whom there are existing relationships in order to accommodate personal and timely contact with a broker who can be presumed to know when it is convenient for a customer to respond to telephone calls. Moreover, such an exemption also may be necessary to accommodate trading with customers in multiple time zones across the United States. The Commission, however, believes that the exemption from the time-of-day and disclosure requirements should be limited to calls to persons with whom the broker has a minimally active relationship. In this regard, the Commission believes that

¹¹ The Commission, however, received two comment letters on an NASD proposal, which is substantially similar. See Letter from Brad N. Bernstein, Assistant Vice President & Senior Attorney, Merrill Lynch, to Jonathan G. Katz, Secretary, SEC, dated Aug. 19, 1996 ("Merrill Lynch Letter"), and Letter from Frances M. Stadler, Associate Counsel, Investment Company Institute ("ICI"), to Jonathan G. Katz, Secretary, SEC, dated Aug. 21, 1996 ("ICI Letter"). For a discussion of the letters and responses thereto, see Securities Exchange Act Release No. 38009 (Dec. 2, 1996) (approving File No. SR-NASD-96-28).

¹² 15 U.S.C. 78f(b)(5).

¹³ 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).

Rule 440A achieves an appropriate balance between providing protection for the public and the members' interest in competing for customers.

The Commission also believes that the amendment to Rule 440A, requiring that a member or person associated with a member obtain from a customer, and maintain for three years, express written authorization when submitting for payment a check, draft, or other form of negotiable paper drawn on a customer's checking, savings, share or similar account, is appropriate. The Commission notes that requiring a member or person associated with a member to obtain express written authorization from a customer in the above-mentioned circumstances assists in the prevention of fraudulent and manipulative acts in that it reduces the opportunity for a member or person associated with a member to misappropriate customers' funds. Moreover, the Commission believes that by requiring a member or person associated with a member to retain the authorization for three years, Rule 440A protects investors and the public interest in that it provides interested parties with the ability to acquire information necessary to ensure that valid authorization was obtained for the transfer of a customer's funds for the purchase of a security.

The Commission also believes that the amendment to the NYSE interpretation to Rule 472 requiring the retention of telemarketing scripts for a period of three years is appropriate. By requiring the retention of telemarketing scripts for three years, the interpretation to Rule 472 assists in the prevention of fraudulent and manipulative acts and practices and provides for the protection of the public in that interested parties will have the ability to acquire copies of the scripts used to solicit the purchase of securities to ensure that members and associated persons are not engaged in unacceptable telemarketing practices.

Finally, the Commission believes that the proposed rule achieves a reasonable balance between the Commission's interest in preventing members from engaging in deceptive and abusive telemarketing acts and the members' interest in conducting legitimate telemarketing practices.

The Commission 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 proposal is identical to the NASD and MSRB rules, which were published for comment and, subsequently, approved by the Commission. The approval of the NYSE's rule and interpretation provides

a consistent standard across the industry. In that regard, the Commission believes that granting accelerated approval to the proposed rule change is appropriate and consistent with Section 6 of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. 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 the filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-NYSE-97-07 and should be submitted by June 11, 1997.

V. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

It is therefore Ordered, pursuant to Section 19(b)(2) of the Act,¹⁴ that the proposed rule change (SR-NYSE-97-07) is approved.

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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-38631; File No. SR-PSE-96-42]

Self-Regulatory Organizations; Pacific Exchange, Inc.; Order Granting Approval to Proposed Rule Change Relating to an Amendment to the Minor Rule Plan and the Adoption of a Forum Fee for Minor Rule Plan Appeals

May 14, 1997.

I. Introduction

On October 25, 1996, the Pacific Exchange, Inc. ("PCX" or "Exchange") submitted to 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 add unbundling of option orders to the Exchange's list of Minor Rule Plan ("MRP") violations and to allow the imposition of a forum fee whenever a finding under the MRP is appealed and affirmed.³ On October 25, 1996, the Exchange submitted a letter providing additional justification for the filing.⁴

The proposed rule change was published for comment in the **Federal Register** on February 24, 1997,⁵ and no comments were received. This order approves the proposal.

II. Description

The Exchange is proposing to adopt a new subsection (5) to PCX Rule 10.11(d) to provide as follows: If, after a hearing or review on the papers pursuant to subsection (d) of PCX Rule 10.16,⁶ a panel appointed by the pertinent committee determines that a Member or Member Organization has violated one or more Exchange rules, as alleged, that panel: (i) May impose any one or more of the disciplinary sanctions authorized

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Rule 19d-1(c)(2) under the Act, 17 CFR 240.19d-1(c)(2), authorizes national securities exchanges to adopt minor rule violation plans for the summary discipline and abbreviated reporting of minor rule violations by exchange members and member organizations. The PCX's Plan was approved by the Commission in Securities Exchange Act Release No. 22654 (Nov. 21, 1985), 50 FR 48853.

⁴ Letter from Michael D. Pierson, Senior Attorney, Regulatory Policy, PCX, to Ivette López, Assistant Director, Division of Market Regulation, SEC, dated October 24, 1996 ("PSE Letter").

⁵ Securities Exchange Act Release No. 38293 (Feb. 14, 1997), 62 FR 8286.

⁶ PCX Rule 10.11, entitled "Appeal of Floor Citations and Minor Rule Plan Sanctions," sets forth the procedures that apply when a member or member organization appeals a sanction imposed in connection with a floor citation or the MRP. See PCX Rules 10.11 and 10.13.

¹⁴ 15 U.S.C. 78s(b)(2).

¹⁵ 17 CFR 200.30-3(a)(12).