

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39303; File No. SR-PCX-97-36]

### Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the Pacific Exchange, Inc., Relating to Codifying Certain Requirements of the Telemarketing and Consumer Fraud and Abuse Prevention Act

November 5, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 9, 1997, 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 and II below, which Items have been prepared by the self-regulatory organization. The PCX filed Amendment No. 1 to its proposed rule change on October 14, 1997,<sup>3</sup> and Amendment No. 2 on October 23, 1997.<sup>4</sup> 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, as amended.

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

The Exchange is proposing to amend its Rules in order to codify certain requirements of the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), which became law in August 1994.<sup>5</sup> The text of the proposed rule change and Amendment Nos. 1 and 2 is available at the Office of the Secretary, PCX, and at the Commission.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> In Amendment No. 1, the PCX requested accelerated approval of its filing on the ground that the Commission has already approved similar filings of other Self-Regulatory Organizations. See Letter from Michael Pierson, Senior Attorney, Regulatory Policy, PCX, to Jerome Roche, Law Clerk, Division of Market Regulation, SEC, dated October 9, 1997.

<sup>4</sup> In Amendment No. 2, the PCX narrowed the scope and applicability of PCX Rule 9.20(b). Additionally, the PCX amended Rule 9.23 to include "telemarketing scripts" within the definition of "sales literature." See Letter from Michael Pierson, Senior Attorney, Regulatory Policy, PCX, to Jerome Roche, Law Clerk, Division of Market Regulation, SEC, dated October 22, 1997.

<sup>5</sup> 15 U.S.C. 6101-08.

#### 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 III 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"),<sup>6</sup> the Exchange adopted in October 1996 a "cold call" rule to implement certain rules of the Federal Communications Commission ("FCC Rule")<sup>7</sup> that require persons 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 (a "do-not-call" list).<sup>8</sup> Under the Telemarketing Act, the Federal Trade Commission adopted detailed regulations ("FTC Rules")<sup>9</sup> to prohibit deceptive and

<sup>6</sup> 47 U.S.C. 227.

<sup>7</sup> 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. (location 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 includes, 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 person or entity may be contacted. 57 FR 48333 (codified at 47 CFR 64.1200). With certain limited exceptions, the FCC Rule applies to all residential telephone solicitations, including those relating to securities transactions. *Id.* The term "telephone solicitation" refers to the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, other than with the called person's express invitation or permission, or to a person with whom the caller has an established business relationship, or by tax-exempt non-profit organization. *Id.*

<sup>8</sup> Securities Exchange Act Release No. 37897 (October 30, 1996) 61 FR 57937 (November 8, 1996) (order approving File No. SR-PSE-96-32).

<sup>9</sup> 16 CFR 310.

abusive telemarketing acts and practices; the regulations became effective on December 31, 1995.<sup>10</sup> The FTC Rules, among other things, (i) require the maintenance of "do-not-call" lists and procedures, (ii) prohibit abusive, annoying, or harassing telemarketing calls, (iii) prohibit telemarketing calls before 8 a.m. or after 9 p.m., (iv) require a telemarketer to identify himself, the company he works for, and the purpose of the call, and (v) require express written authorization or other verifiable authorization from the customer before use of negotiable instruments called "demand drafts."<sup>11</sup>

Under the Telemarketing Act, the SEC is required either to promulgate or to require the self-regulatory organizations ("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.<sup>12</sup> The

<sup>10</sup> §§ 310.3-4 of FTC Rules.

<sup>11</sup> *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 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 preapproved" in the location where the customer's signature normally appears.

<sup>12</sup> In response, the National Association of Securities Dealers ("NASD"), the Municipal Securities Rulemaking Board ("MSRB"), the New York Stock Exchange ("NYSE"), the American Stock Exchange ("Amex"), the Philadelphia Stock Exchange ("Phlx"), and the Chicago Board Options Exchange ("CBOE") 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); 38053 (Dec. 16, 1996) 61 FR 68078 (Dec. 26, 1996) (order approving File No. SR-MSRB-96-06); 38638 (May 14, 1997) 62 FR 27823 (May 21, 1997) (order approving File No. SR-NYSE-97-07); 38724 (June 6, 1997) 62 FR 32390 (June 13, 1997) (order approving File No. SR-Amex-97-17); 38875 (Jul. 25, 1997) 62 FR 41983 (Aug. 4, 1997) (order approving File No. SR-Phlx-97-18); and 39010 (Sep. 3, 1997) 62 FR 47712 (Sep. 10, 1997) (order approving File No. SR-CBOE-97-39).

The Commission has determined that the NASD Rule, MSRB Rule, the NYSE Rule, the Amex Rule, and the Phlx Rule, together with the 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).

purpose of the proposed rule change is to amend PCX Rule 9.20 in response to the Commission's request that SROs promulgate rules substantially similar to applicable provisions of the FTC Rules adopted pursuant to the Telemarketing Act.

*Time Limitations and Disclosure.* The proposed rule change adds new Rule 9.20(b)(1) to prohibit a member or person associated with a member 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)(2) to Rule 9.20, such member or associated person 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 (b)(3) to Rule 9.20 creates exemptions from the time-of-day and disclosure requirements of paragraphs (1) and (2) for telephone calls by associated persons, or other associated persons acting at the direction of such persons for purposes of maintaining and servicing existing customers assigned to or under the control of the associated persons, to certain categories of "existing customers." Proposed paragraph (3) defines "existing customer" as a customer for whom the broker or dealer, or a clearing broker or dealer on behalf of the broker or dealer, carries an account. Proposed subparagraph (3)(A) exempts calls to an existing customer who, within the preceding twelve months, 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. Proposed subparagraph (3)(B) exempts calls 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 such 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.

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 Boston Stock Exchange, the Cincinnati Stock Exchange, and the Chicago Exchange to file similar proposals.

Proposed subparagraph (3)(C) 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.* The proposed rule change adds Rule 9.20(d) to: (i) Prohibit a member or person 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 (ii) require the retention of such authorization for a period of three years.

*Telemarketing Scripts.* The proposed rule change also amends the definition of "sales literature" contained in Rule 9.23 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 Exchange believes that the basis under the Act for the proposed rule change is the requirement under Section 6(b)(5)<sup>13</sup> 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 Exchange believes that 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.<sup>14</sup>

<sup>13</sup> 15 U.S.C. 78f(b)(5).

<sup>14</sup> The Commission, however, received two comment letters on a NASD proposal (SR-NASD-96-28), which is substantially similar. See Letter from Brad N. Bernstein, Assistant Vice President and Senior Attorney, Merrill Lynch, to Jonathan G. Katz, Secretary, SEC, dated Aug. 19, 1996 ("Merrill Lynch Letter"), and Letter from Frances M. Stadler,

## III. 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 in the Commission's Public Reference Room, 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 PCX. All submissions should refer to File No. SR-PCX-97-36 and should be submitted by December 3, 1997.

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

The Commission finds that the proposed rule change, as amended, 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 Act<sup>15</sup> which requires, among other things, that the rules of the exchange be designed to prevent further fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.<sup>16</sup> The proposed rule change, as amended, 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

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).

<sup>15</sup> 15 U.S.C. 78f(b)(5).

<sup>16</sup> 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).

allowing for legitimate telemarketing activities.

The Commission believes that the amendments to Rule 9.20, prohibiting a member of 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 prior consent of the person, is appropriate. The Commission notes that, by restricting the times during which a member of a 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 9.20, requiring a member of person associated with a member to promptly disclose to the called person in a clear and conspicuous manner the caller's identify 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, are 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 about purchasing securities. Moreover, by requiring the associated person to identify the firm for which the caller is being contacted, the Rule encourages responsible use of the telephone to market securities.

The Commission also believes that Rule 9.20, 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 customer 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 least a minimally active relationship. In this regard, the Commission believes that Rule 9.20 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 9.20, requiring that a member or a 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 9.20 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 Rule 9.23 requiring the retention of telemarketing scripts for three years is appropriate. By requiring the retention of telemarketing scripts for three years, Rule 9.23 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, including Amendment Nos. 1 and 2, 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 PCX's rules 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.<sup>17</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>18</sup> that the proposed rule change (SR-PCX-97-36), including Amendment Nos. 1 and 2, is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>19</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 97-29748 Filed 11-10-97; 8:45 am]

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## 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 January 12, 1998.

**FOR FURTHER INFORMATION CONTACT:** Curtis B. Rich, Management Analyst, Small Business Administration, 409 3rd Street, S.W., Suite 5000, Washington, D.C. 20416. Phone Number: 202-205-6629.

#### SUPPLEMENTARY INFORMATION:

*Title:* "Small Disadvantaged Business Certification Application".

*Type of Request:* New Collection.

*Form No:* N/A.

*Description of Respondents:* Small Businesses seeking certification as a Small Disadvantaged Business.

*Annual Responses:* 100,000.

*Annual Burden:* 5,000.

*Comments:* Send all comments regarding this information collection to Patricia A. Lefevre, Office of Minority Enterprise Development, Small Business Administration, 409 3rd Street, S.W., Suite 8000, Washington, D.C. 20416. Phone No: 202-205-6416. Send

<sup>17</sup> 15 U.S.C. 78f.

<sup>18</sup> 15 U.S.C. 78s(b)(2).

<sup>19</sup> 17 CFR 200.30-3(a)(12).