V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[8] that Amendment No. 5 to the proposed rule change, SR–NASD–98–26, which extends the NASD Short Sale Rule pilot and the suspension of the current PMM standards to March 31, 1999, be and hereby is approved on an accelerated basis.[9]

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Jonathan G. Katz,

Secretary.

[FR Doc. 98–26276 Filed 9–30–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40479; File No. SR–NYSE–98–28]

Self Regulatory Organizations; Notice of Filing of Proposed Rule Changes by the New York Stock Exchange, Inc. Relating to Arbitration Rules

September 24, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 15, 1998 the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule changes as described in Item 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 changes from interested persons.

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

The proposed amendments to NYSE Rules 347 and 600 will exclude claims of employment discrimination, including sexual harassment, in violation of a statute from arbitration unless the parties have agreed to arbitrate the claim after it has arisen. The text of the proposed rule changes are as follows (additions are italicized, deletions are bracketed.)

* * * * *

NYSE Rule 347. Controversies As to Employment or Termination of Employment

(*a*) *Except as provided in paragraph (b),* [A]any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

(b) A claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for arbitration only where the parties have agreed to arbitrate the claim after it has arisen.

NYSE Rule 600. Arbitration

(f) Any claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for submission to arbitration under these Rules only where the parties have agreed to arbitrate the claim after it has arisen.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below and is set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

1. Purpose

The purpose of the proposed rule changes is to:

- Exclude any claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute from the requirement that all employment disputes between a registered representative and a member or member organization be arbitrated, except where the parties agree to arbitrate the claim after it has arisen. (NYSE Rule 347)
- Provide that any claim alleging employing discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for submission to arbitration only where the parties have agreed to arbitrate the claim after it has arisen. (NYSE Rule 600)

Background

NYSE Rule 347 has been in effect since the late 1950's, and requires that any employment-related disputes between a registered representative and a member or member organization be settled by arbitration.[3] In order to become ''registered'' an individual is required to sign and file with the Exchange a Form U–4 (Uniform Application for Securities Registration or Transfer). Form U–4 requires registered persons to submit to arbitration any claim that is required to be arbitrated under the rules of the self-regulatory organizations with which they register.

Until the 1990's, the rule was generally invoked to arbitrate business and contract disputes, such as wrongful discharge, breach of contract or claims regarding compensation. Beginning with the Supreme Court's decision in *Gilmer* v. *Interstate/Johnson Lane*,[4] claims alleging employment discrimination, including sexual harassment claims, were compelled to arbitration.

In 1994, the General Accounting Officer (''GAO'') conducted a study on the arbitration of employment discrimination disputes in the securities industry.[5] While the GAO Report did not address the adequacy of arbitration as a means of resolving employment discrimination disputes, it made several recommendations for improving the arbitration process. The recommendation included specialized training of arbitrators in discrimination law and the appointment of more women and minorities as arbitrators.

Despite steps to improve the process, registered representatives and others continue to oppose mandatory arbitration of discrimination claims pursuant to the Form U–4 and other pre-dispute agreements. In July 1997, the U.S. Equal Employment Opportunity Commission (''EEOC'') issued a policy statement that mandatory pre-dispute agreements to arbitrate statutory

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[8] 15 U.S.C. 78s(b)(2).

[9] In approving Amendment No. 5, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] NYSE Rule 347 provides: ''Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.''

[4] 500 U.S. 20 (1991). In *Gilmer*, the Court held that a registered representative could be compelled to arbitrate his claim under the Age Discrimination in Employment Act (''ADEA'') pursuant to Form U–4 and NYSE Rule 347.

[5] Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes (GAO/HEHS–94–17, March 30, 1994).

discrimination claims are inconsistent with the purpose of the federal civil rights laws.[6]

Two federal court cases decided in 1998 support the EEOC's position. In January 1998, a Massachusetts district court in *Rosenberg* v. *Merrill Lynch*[7] declined to compel arbitration of plaintiff's Title VII and the ADEA claims pursuant to the agreement to arbitrate contained in the Form U–4 plaintiff was required to sign as a condition of her employment. In May 1998, the Court of Appeals for the Ninth Circuit held, in *Duffield* v. *Robertson Stephens & Company*,[8] that employers could not compel employees to waive their right to a judicial forum under Title VII, and therefore plaintiff could not be compelled to arbitrate her statutory discrimination claims pursuant to Form U–4. Prior to these decisions, federal courts had consistently upheld the arbitration of employment discrimination claims pursuant to the Form U–4.

On October 17, 1997, the National Association of Securities Dealers, Inc. (''NASD'') submitted to the Commission a proposed rule changes to remove the requirement from its rules that registered representatives must arbitrate statutory employment discrimination claims.[9] Under the NASD's proposal, an employee could file such a claim in court unless he was obligated to arbitrate pursuant to a separate agreement entered into either before or after the dispute arose.

In announcing the approval of the NASD rule amendment, SEC Chairman Arthur Levitt ''encourage[d] the other SROs to promptly change their rules to conform to those of the NASD.'' [10] The Commission's order stated that the NASD intends to make changes to its arbitration program to make arbitration more attractive to parties for the resolution of discrimination claims.[11] The NASD previously created a ''Working Group'' that includes attorneys who represent employees, member firms and neutrals. The group is developing proposals and will be recommending changes to the NASD's arbitration procedures for discrimination cases. A representative of the Exchange is participating as an observer in the Working Group's discussion.

The Exchange is following Chairman Levitt's suggestion by proposing an amendment to NYSE Rule 347. The amendment will create an exception to the NYSE rule that requires arbitration of all employment-related claims of registered representatives. Paragraph (a) of the proposed amendment to NYSE Rule 347 adds language indicating that paragraph (b) contains an exception to the requirement to arbitrate employment disputes. Paragraph (b) provides that ''a claim alleging employment discrimination, including any sexual harassment claims, in violation of a statute shall be eligible for arbitration only where the parties have agreed to arbitrate the claim after it has arisen.'' [12]

In addition, the Exchange is going further by proposing rule amendments under which statutory discrimination claims will not be eligible for arbitration pursuant to any pre-dispute agreement to arbitrate. This action brings the Exchange's arbitration policy into conformity with the EEOC's ''Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment.'' [13]

In its December 1997 comment letter to the SEC regarding the NASD proposal, the EEOC reiterated its position ''that *pre*-dispute arbitration agreements, particularly those that mandate binding arbitration of discrimination claims as a condition of employment, are contrary to the fundamental principles reflected in this nation's employment discrimination laws. We recommend therefore, that the proposed rule be revised to permit arbitration of statutory employment discrimination claims only under *post*-dispute arbitration agreements.'' [14]

The Exchange has had a general arbitration provision in its Constitution since 1817. NYSE Rule 600 requires the arbitration of disputes between customers or non-members and members or member organization, pursuant to any written agreement to arbitrate or upon the demand of the customer or non-member.[15] The vast majority of disputes resolved by Exchange arbitration are business disputes arising out of securities transactions with investors, and contractual disputes between members and their employees. Since 1992, the year following the *Gillmer* decision, the Exchange has received an average of 18 discrimination claims a year.[16]

The Exchange's proposed amendments will limit the availability of the Exchange's forum for the resolution of employment discrimination claims to those cases where the parties have agreed to arbitrate the claim after it has arisen, as recommended by the EEOC.

The Exchange is also proposing to amend NYSE Rule 600, adding paragraph (f) that provides that claims alleging employment discrimination, including any sexual harassment claim, shall be eligible for submission to arbitration only where the parties have agreed to arbitrate the claim after it has arisen. This amendment excludes from Exchange arbitration statutory employment discrimination claims of non-registered employees pursuant to pre-dispute arbitration agreements. (NYSE Rule 347 only applies to ''registered'' employees).

The EEOC and several members of Congress have endorsed arbitration as an effective means of resolving discrimination claims, provided the parties agree to arbitrate after the claim has arisen. The Exchange's proposed amendment provides a forum for those employees who choose, post-dispute, to resolve their statutory employment discrimination claims through arbitration.

Some employment disputes may contain both contract or tort claims as well as statutory employment discrimination claims. Under amended NYSE Rule 347 (and NYSE Rule 600 for non-registered employees who have executed pre-dispute arbitration agreements) these cases may be bifurcated. The employment discrimination claims will be heard in a forum other than the Exchange, such as court, while any claims subject to arbitration may continue to be heard at

[6] EEOC Notice No. 915.002, July 10, 1997.

[7] 76 FEP 681 (D. Mass. 1998).

[8] 1998 WL 227469 (9th Cir.).

[9] Exchange Act Release No. 39421 (December 10, 1997), 62 FR 66164 (December 17, 1997).

[10] SEC News Release 98–61, June 23, 1998.

[11] Exchange Act Release No. 40109 (June 22, 1998), 63 FR 35299 (June 29, 1998).

[12] Claims ''in violation of a statute'' are not limited to the federal civil rights laws and include all federal, state and local anti-discrimination statutes.

[13] EEOC Notice No. 915.002, July 10, 1997.

[14] Letter from Gilbert F. Casellas, Chairman, EEOC, to Jonathan G. Katz, Secretary, SEC, Re: NASD Proposed Rule Change on Arbitration of Employment Discrimination Claims, December 1997.

[15] NYSE Rule 600(a) provides: ''Any dispute, claim or controversy between a customer or non-member and a member, allied member, member organization and/or associated person arising in connection with the business of such member, allied member, member organization and/or associated person in connection with his activities as an associated person shall be arbitrated under the Constitution and Rules of the New York Stock Exchange, Inc. as provided by any duly executed and enforceable written agreement or upon the demand of the customer or non-member.''

[16] Historically, discrimination claims accounted for less than two percent of the total claims filed at the Exchange, except for 1996 (when discrimination claims accounted for two point six percent) and the first six months of 1998 where, due to a steady decline in case filings generally, discrimination claims accounted for three percent of the cases filed.

the Exchange.[17] However, NYSE Rule 347 requires arbitration of claims ''at the instance'' of either party, and therefore may be waived, allowing the entire case to be heard in court. The parties may also avoid bifurcation by agreeing to proceed with all claims in a single forum. Given a choice, after a dispute has arisen, employees in many instances believe that arbitration is preferable to protracted and expensive litigation and will willingly make that choice.[18]

2. Statutory Basis

The proposed changes are consistent with Section 6(b)(5) of the Exchange Act in that they promote just and equitable principles of trade by insuring that members and member organizations and the public have a fair and impartial forum for the resolution of their disputes.

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

The Exchange does not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Changes Received from Members Participants or Others.

The Exchange has neither solicited nor received written comments on the proposed rule changes.

III. Date of Effectiveness of the Proposed Rule Changes 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 Exchange consents, the Commission will:

(A) By order approve the proposed rule changes, or

(B) Institute proceedings to determine whether the proposed rule changes should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule changes is consistent with the Exchange Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 5th Street, NW, Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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 NYSE. All submissions should refer to File No. SR–NYSE–98–28 and should be submitted by October 22,1 998.

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

Jonathan G. Katz,

Secretary.

[FR Doc. 98–26235 Filed 9–30–98; 8:45 am]

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[17] The bifurcation of securities industry claims is not unprecedented. Before the Supreme Court's decision in *Shearson* v. *McMahon*, 482 U.S. 220 (1987) (holding that claims under the Exchange Act could be compelled to arbitration), the Supreme Court decided *Dean Witter Reynolds, Inc.* v. *Byrd*, 105 S. Ct. 1238 (1985). In Byrd, the dispute involved allegations of federal securities laws violations and pendent state law claims. The Court compelled the state law claims to arbitration and held that the federal securities laws claims could be heard in court.

[18] *See Duffield* v. *Robertson Stephens & Company*, 1998 WL 227469 (9th Cir.).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40482; File No. SR–PCX–98–47]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Pacific Exchange, Inc. Relating to a Supplemental Specialist Post Fee

September 25, 1998.

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 September 17, 1998, 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 PCX.[3] The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons and to approve the proposal, as amended.

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

PCX is proposing to adopt a Supplemental Specialist Post Fee that will apply when the Equity Floor Trading Committee permits a specialist firm to consolidate its specialist posts on the Equity Floors of the Exchange. The text of the proposed rule change is available at the Office of the Secretary, PCX 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, PCX 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. PCX 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

Unlike other stock exchanges, PCX maintains a ''specialist post'' structure—rather than a ''specialist unit'' structure—on its Equity Floors. A ''specialist post'' structure requires each registered specialist to be assigned to a specific post where certain designated stocks are traded. If a specialist firm is operating ten specialist posts, for example, the firm would be required to maintain a specialist at each of the ten posts. By contrast, under a ''specialist unit'' structure, stocks are allocated to the specialist unit, rather than to a particular post or particular specialist. If 500 stocks are traded at a specialist unit, for example, it would be generally within the specialist firm's discretion to determine the number of specialists necessary to operate that unit.[4]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] On September 23, 1998, the Exchange filed Amendment No. 1 to the proposed rule filing, the substance of which is incorporated into the notice. *See* letter from Michael Pierson, Senior Attorney, Regulatory Policy, PCX, to Richard Strasser, Assistant Director, Division of Market Regulation (''Division''), Commission, dated September 22, 1998.

[4] On the PCX Options Floor, Lead Market Makers (''LMMs''), who are like specialists in several respects, are permitted to run their operations in a