and a national market system, and, in general to protect investors and the public interest. Nasdaq believes that the proposed rule change is consistent with the purposes of the Act in that it will provide a cost effective and efficient mechanism to report trades, and therefore facilitate clearance and settlement. Additionally, Nasdaq believes the proposed rule change will enhance the process by which members engage in the comparison and clearing of securities transactions.

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,[13] which requires that the Association's rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which Nasdaq operates or controls.

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

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[14] and Rule 19b–4(f)(6)[15] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such 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.[16]

Nasdaq has requested that the Commission accelerate the operative date. The Commission finds good cause to designate the proposal to become immediately operative upon filing, because such designation is consistent with the protection of investors and the public interest. Acceleration of the operative date will allow member firms that wish to report trades to ACT via the internet to access the service immediately. The Commission finds no reason to require NASD members to wait 30 days before participating in a service that is designed to be both efficient and cost-effective. For these reasons, the Commission finds good cause to designate that the proposal become operative upon filing.[17]

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 NASD. All submissions should refer to file number SR–NASD–01–05 and should be submitted by March 16, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[18]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–4427 Filed 2–22–01; 8:45 am]

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[13] 15 U.S.C. 78o–3(b)(5).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6).

[16] The 60-day abrogation period began February 8, 2001. *See* footnote 3, *supra.*

[17] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43971; File No. SR–PCX–00–05]

Self-Regulatory Organizations; Order Granting Partial Approval of Proposed Rule Change and Notice of Filing and Order Granting Partial Accelerated Approval of Amendments No. 2 and 3 to the Proposed Rule Change by the Pacific Exchange, Inc. Relating to Its Automatic Execution System

February 15, 2001.

I. Introduction

On March 8, 2000, 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 allow broker-dealer orders to be eligible for automatic execution through the Exchange's Automatic Execution system (''Auto-Ex'') on an issue-by-issue basis. The Exchange also proposed to adopt rules to establish means of improving compliance with rules pertaining to the use of Auto-Ex. On June 27, 2000, the PCX filed Amendment No. 1 to the proposed rule change.[3] Notice of the proposed rule change, including Amendment No. 1, was published for comment in the **Federal Register** on July 25, 2000.[4] The Commission received four comment letters with respect to the proposal.[5] On January 18, 2001, the PCX filed Amendment No. 2 to the proposed rule change.[6] On January 26, 2001, the

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

[2] 17 CFR 240.19b–4.

[3] *See* letter from Michael D. Pierson, Vice President, Regulatory Policy, PCX, to Gordon Fuller, Special Counsel, Division of Market Regulation (''Division''), Commission, dated June 26, 2000 (''Amendment No. 1''). In Amendment No. 1, the PCX revised some of the text of the proposed rule change.

[4] Securities Exchange Act Release No. 43049 (July 18, 2000), 65 FR 45810.

[5] *See* letters from David B. Bayless, Morrison & Foerster LLP (''Morrison & Foerster''), to Jonathan G. Katz, Secretary, Commission, dated August 14, 2000 (''Morrison & Foerster Letter''); David M. Battan, Vice President and General Counsel, Interactive Brokers LLC (''Interactive Brokers''), to Jonathan G. Katz, Secretary, Commission, dated August 15, 2000 (''Interactive Brokers Letter''); Mike Ianni, to Jonathan G. Katz, Secretary, Commission, dated August 9, 2000 (''Ianni E-Mail''); and William M. Thomas, Member of Congress, forwarding a letter from Austin Kalb, Chief Executive Officer, OutSource International Corporation (''OutSource International''), to Jonathan G. Katz, Secretary, Commission, dated August 14, 2000 (''OutSource International Letter'').

[6] *See* letter from Cindy Sink, Senior Attorney, Regulatory Policy, PCX, to Sapna Patel, Attorney, Division, Commission, dated January 17, 2001

PCX filed Amendment No. 3 to the proposed rule change.[7] This order approves the portions of the proposed rule change relating to provisions to establish means of improving compliance with the Exchange's Auto-Ex rules, as set forth below; grants accelerated approval to Amendments No. 2 and 3 to those portions of the proposed rule change; and solicits comments form interested persons on these amendments.[8]

Below is the final text of the approved portions of the proposed rule change, as amended. Proposed new language is *italicized*; proposed deletions are in brackets.

* * * * *

¶ 5231 Automatic Execution System

Rule 6.87*(a). Definitions. For purposes of Rule 6:*

(1) The term ''Auto-Ex'' means the automated execution system feature of POETS that is owned and operated by the Exchange and that provides automated order execution and reporting services for options.

(2) The term ''User'' means any person or firm that obtains electronic access to Auto-Ex through an Order Entry Firm.

(3) The term ''Order Entry Firm'' means a member organization of the Exchange that is registered as an Order Entry Firm for purposes of sending orders to the Exchange for execution by Auto-Ex.

(b) Eligible Orders.

(1) [(a).] Only non-broker/dealer customer orders are eligible for execution on the Exchange's *Auto-Ex System* [Automatic Execution System (''Auto-Ex'')]. For purposes of this Rule, the term ''broker/dealer'' includes foreign brokers/dealers.

(2) [(b)] The Options Floor Trading Committee (''OFTC'')[9] shall determine the size of orders that are eligible to be executed on Auto-Ex. Although the order size parameter may be changed on an issue-by-issue basis by the OFTC, the maximum order size for execution through Auto-Ex is as follows:

(A)[(1)] Equity Options: the maximum order size for execution through Auto-Ex for equity options is one hundred (100) contracts;[10]

(B)[(2)] Index Options: the maximum order size for execution through Auto-Ex is one hundred (100) contracts for:

(i)[(A)] the PSE Technology Index;

(i)[(B)] the Wilshire Small Cap Index; and

(iii)[(C)] the Morgan Stanley Emerging Growth Index.[11]

(3)[(c)] The [Options Floor Trading Committee] *OFTC* may increase the size of Auto-Ex eligible orders in one or more classes of multiply traded equity options to the extent that other exchanges permit such larger-size orders in multiply traded equity options of the same class or classes to be entered into their own automated execution systems. If the [Options Floor Trading Committee] *OFTC* intends to increase the Auto-Ex order size eligibility pursuant to this Rule, the Exchange will notify the Securities and Exchange Commission pursuant to Section 19(b)(3)(A) of the Exchange Act.

(c) Order Entry Firm Registration Participation in Auto-Ex as an Order Entry Firm requires registration with the Exchange. Continued registration depends upon the Order Entry Firm's initial and continuing compliance with the following requirements:

(1) Execution of an Auto-Ex Order Entry Firm Application Agreement with the Exchange;

(2) Compliance with all applicable PCX options trading rules and procedures;

(3) Written notice must be provided to all Users regarding the proper use of Auto-Ex; and

(4) Maintenance of adequate procedures and controls that will permit the Order Entry Firm of effectively monitor and supervise the entry of electronic orders by all Users. Order Entry Firms must monitor and supervise the entry of orders by Users to prevent the prohibited practices set forth in subsection (d).

(d) Prohibited Practices. Prohibited practices include, but are not limited to, the following:

(1) Entering an order for an account that is ineligible for execution on Auto-Ex pursuant to subsection (b), above.

(2) Dividing an order involving a single investment decision into multiple smaller lots for the purpose of meeting the order size requirements for Auto-Ex eligibility.

(A) Multiple orders to trade the same option issue that are on the same side of the market (whether short or long) and multiple orders to trade the same option series entered within any 15-second period for the account of the same beneficial owner will be presumed to be based on a single investment decision.

(B) Multiple orders to trade the same option issue that are on the same side of the market (whether short or long) and multiple orders to trade the same option series entered outside of any 15-second period for the account of the same beneficial owner will be deemed to be separate investment decisions; provided, however, that no Order Entry Firm may divide up to permit an existing order to be divided up to make its parts eligible for entry into Auto-Ex.

(3) Entering orders via POETS to perform a market making function as provided in Rule 6.88(c).

(4) Effecting transactions that constitute manipulation as provided in PCX Rule 4.6(a) and SEC Rule 10b.5.

[(d)] Firms entering orders for execution on Auto-Ex may not divide them up in order to make their parts eligible for entry into Auto-Ex.]

(e)–(k)—[(d)–(j)]–No change.

* * * * *

POETS

¶5231D Pacific Options Exchange Trading System

Rule 6.88 (a)–(b)–No change.

(c) Entering orders via POETS to perform a market making function is prohibited. No member or person associated with a member may use POETS on a regular and continuous basis to simultaneously execute orders to buy and sell series for the account of the same beneficial holder. In making the determination of whether a member or person associated with a member is using the POETS system to perform a market making function, the Exchange will consider the following factors; the simultaneous or near-simultaneous entry of limit orders to buy and sell the same option; and the entry of multiple limit orders at different prices in the same option series.

* * * * *

II. Description of the Proposal

In 1990, the Commission approved the Exchange's POETS system on a pilot program basis and, in 1993, POETS was approved permanently.[12] POETS is

(''Amendment No. 2''). In Amendment No. 2, the PCX further revised some of the proposed rule text. Specifically, the PCX added a safe harbor provision for orders entered more than 15 seconds apart, eliminated provisions that would have permitted the PCX to nullify certain orders, incorporated a provision prohibiting the use of the Pacific Options Exchange Trading System (''POETS'') to perform a market making function, and made other minor technical changes. Revisions made by Amendment No. 2 are incorporated in the description of the proposal in Section II, *infra.*

[7] *See* letter from Cindy Sink, Senior Attorney, Regulatory Policy, PCX, to Sapna Patel, Attorney, Division, Commission, dated January 25, 2001 (''Amendment No. 3''). In Amendment No. 3, the PCX made some minor technical corrections to the proposed rule text.

[8] The Commission is not approving at this time the portion of the proposed rule change that would allow orders for the accounts of brokers-dealers, excluding those orders for Market Makers or Specialists on an exchange who are exempt from the provisions of Regulation T of the Federal Reserve Board pursuant to Section 7(c)(2) of the Act, to be executed on Auto-Ex on an issue-by-issue basis.

[9] Minor technical changes were made to the proposed rule. In subparagraph (b)(2), the reference to ''The Options Floor Trading Committee (''OFTC'')'' was retained in full and not replaced with the ''OFTC.'' In addition, the first letter of the first word in each subsection under subparagraph (c) was capitalized to make the proposed rule text consistent with the rest of the rule text. Telephone conversation between Michael D. Pierson, Vice President, Regulatory Policy, PCX, and Sapna C. Patel, Attorney, Division, Commission, on February 21, 2001.

[10] *See* Securities Exchange Act Release No. 43887 (January 25, 2001), 66 FR 8831 (February 2, 2001) (approval order increasing the maximum order size for execution through Auto-Ex from seventy-five contracts to one hundred contracts).

[11] *Id.*

[12] *See* Securities Exchange Act Release No. 27633 (January 18, 1990), 55 FR 2466 (January 24, 1990) (approving POETS on a pilot basis); Securities Exchange Act Release No. 32703 (July 30, 1993), 58 FR 42117 (August 6, 1993) (approving POETS on a permanent basis). The Auto-Ex system permits eligible market or marketable limit orders sent from member firms to be executed automatically at the displayed bid or offering price. Participating market makers are designated as the contra side to each Auto-Ex order. Participating market makers are assigned by Auto-Ex on a rotating basis, with the first market maker selected at random from the list of signed-on market makers. Automatic executions through Auto-Ex are currently available for public

Continued

comprised of an options order routing system (''ORS''), an automatic and semi-automatic execution system (''Auto-Ex''), an on-line book system (''Auto-Book''), and an automatic market quote update system (''Auto-Quote'').

The Exchange proposes several definitional changes to PCX Rule 6.87 pertaining to Auto-Ex.[13] Specifically, the Exchange proposes to add new PCX Rule 6.87(a) to codify the terms ''Auto-Ex,'' ''User,'' and ''Order Entry Firm.'' First, the Exchange proposes to define the term ''Auto-Ex'' to mean the automated execution system feature of POETS that is owned and operated by the Exchange and that provides automated order execution and reporting services for options. Second, the Exchange proposes to define the term ''User'' to mean any person or firm that obtains electronic access to Auto-Ex through an Order Entry Firm. Third, the Exchange proposes to define the term ''Order Entry Firm'' to mean a member organization of the Exchange that is registered as an Order Entry Firm for purposes of sending orders to the Exchange for execution by Auto-Ex. The Exchange represents that it is proposing to codify these terms in order to provide users of Auto-Ex with clear and precise definitions for terms used in PCX Rule 6.87.

In addition, the Exchange proposes to add new PCX Rule 6.87(c) to require Order Entry Firms, as defined in proposed PCX Rule 6.87(a), to register with the Exchange as a condition of having access to Auto-Ex. Such registration will require that an Order Entry Firm execute an Order Entry Firm Application Agreement with the Exchange; comply with all applicable PCX options trading rules and procedures; provide written notice to all Users regarding proper use of Auto-Ex; and maintain adequate procedures and controls that will permit the Order Entry Firm to effectively monitor and supervise the entry of electronic orders by all Users. The Exchange represents that it is proposing these rule changes to safeguard the use of Auto-Ex and to obligate Order Entry Firms to inform and supervise Users to ensure compliance with PCX rules and procedures. The Exchange also represents that these proposed changes will protect investors and the public from changes in options prices or markets caused by uses of Auto-Ex that the Exchange believes are prohibited.

Furthermore, the Exchange proposes to add new PCX Rule 6.87(d) to codify certain practices that otherwise are prohibited on Auto-Ex. Proposed PCX Rule 6.87(d) lists four prohibited uses of Auto-Ex: (1) Entering an order for an account that is ineligible for execution on Auto-Ex; (2) dividing an order involving a single investment decision into multiple smaller lots for the purposes of meeting the order size requirements for Auto-Ex eligibility, which includes entering multiple orders to trade the same option issue that are on the same side of the market (whether short or long) and multiple orders to trade the same series for the account of the same beneficial owner within the same fifteen second period; (3) entering orders via POETS to perform a market making function; and (4) effecting transactions that constitute manipulation as provided in PCX Rule 4.6(a)[14] and SEC Rule 10b–5[15] under the Act. A detailed explanation of each prohibited practice follows.

First, with regard to the type of orders eligible for execution on Auto-Ex, the Exchange proposes that all orders not eligible under subsection (b) of proposed PCX Rule 6.87 be deemed ineligible orders. The Exchange represents that this proposed rule change will clarify what orders are eligible for execution on Auto-Ex.

Second, the Exchange proposes to replace PCX Rule 6.87(d) with PCX Rule 6.87(d)(2). PCX Rule 6.87(d) states that ''firms entering orders for execution on Auto-Ex may not divide them up in order to make their parts eligible for entry into Auto-Ex.'' The Exchange proposes to replace PCX Rule 6.87(d) with new PCX Rule 6.87(d)(2), which prohibits dividing an order involving a single investment decision into multiple smaller lots for the purpose of meeting the order size requirements for Auto-Ex eligibility. Under proposed PCX Rule 6.87(d)(2), multiple orders to trade the same option issue that are on the same side of the market (whether short or long) and multiple orders to trade the same series entered within any fifteen second period for the account of the same beneficial owner will be presumed to be based on a single investment decision. Multiple orders to trade the same option issue that are on the same side of the market (whether short or long) and multiple orders to trade the same series entered outside any fifteen second period for the account of the same beneficial owner will be deemed to be separate investment decision; provided, however, that no Order Entry Firm may divide up or permit an existing order to be divided up to make its parts eligible for entry into Auto-Ex.

Third, the Exchange proposes to add PCX Rule 6.88(c) to prohibit Users from using POETS to perform market making functions and to specify in rule 6.87(d) that entering such orders via POETS is a prohibited practice. PCX Rule 6.32 defines a Market Maker as an individual who is registered with the Exchange for the purpose of making transactions as dealer-specialist on the Floor of the Exchange. With regard to entering orders via POETS to perform a market making function, proposed PCX Rule 6.88(c) prohibits a member or associated person of a member from using POETS on a regular and continuous basis to simultaneously execute orders to buy and sell series for the account of the same beneficial holder. In making the determination of whether a member or person is using POETS to perform a market making function, the Exchange will consider the following factors: the simultaneous or near-simultaneous entry of limit orders to buy and sell the same option; and the entry of multiple limit orders at different prices in the same option series. The Exchange proposes this change to prohibit Users from acting as Market Makers through the use of POETS.[16]

customer orders of twenty contracts or less (or in certain issues, for one hundred contracts or less) in all series of options traded on the Options Floor of the Exchange.

[13] The Exchange proposes to renumber PCX Rule 6.87(a) as PCX Rule 6.87(b)(1) and PCX Rules 6.87(b) and (c) as PCX Rules 6.87(b)(2) and (3). The Exchange also proposes to renumber PCX Rules 6.87(d) through (j) as PCX Rules 6.87(e) through (k).

[14] PCX Rule 4.6 states that ''[n]o member, member firm or any participant therein shall effect or induce the purchase or sale or otherwise effect transactions in any security for the purpose of creating or inducing a false, misleading or artificial appearance of activity in such security, or for the purpose of unduly or improperly influencing the market price of such security, or for the purpose of making a price which does not reflect the true state of the market in such security''

[15] 17 CFR 240.10b–5.

[16] *Cf.* PCX Rules 6.89(b) and 6.90(d)(3). PCX Rule 6.89(b) states that ''[n]o Floor Broker may knowingly use a Floor Broker Hand-Held Terminal, on a regular and continuous basis, to simultaneously represent orders to buy and sell option contracts in the same series for the account of the same beneficial holder. If the Exchange determines that a person or entity has been sending, on a regular and continuous basis, orders to simultaneously buy and sell option contracts in the same series for the account of the same beneficial holder, the Exchange may prohibit orders for the account of such person or entity from being sent through the Exchange's Member Firm Interface for such period of time as the Exchange deems appropriate.''

PCX Rule 6.90(d)(3) states that ''[t]erminals may be used to receive brokerage orders only. Terminals may not be used to perform a market making function. No Member may knowingly use a Terminal on a regular and continuous basis to simultaneously represent orders to buy and sell option contracts in the same series for the account of the same beneficial holder. If the Exchange determines that a person or entity has been sending, on a regular and continuous basis, orders to simultaneously buy and sell option contracts in the same series for the account of the same beneficial holder, the Exchange may prohibit orders for the

Finally, the Exchange proposes to add PCX Rule 6.8(d)(4) to codify, as a prohibited practice, effecting transactions that constitute manipulation as provided in PCX Rule 4.6(a) and SEC Rule 10b–5 under the Act. The Exchange represents that this proposed change will prevent members or Users from using Auto-Ex to violate PCX and SEC anti-manipulation rules and to protect investors and the public.

III. Summary of Comments

The Commission received four comment letters regarding the proposed rule change with one commenter supporting, and three commenters opposing, the proposed rule change.[17] These comments were submitted in response to the proposal as it appeared in the **Federal Register** notice.[18] The PCX revised the proposed rule change in Amendments No. 2 and 3 to address many of the commenters' concerns.

Morrison & Foerster stated that the proposal would ''protect investors and promote the public interest by prohibiting certain manipulative practices with respect of the use of * * * AutoEx * * * on the Pacific Exchange and [would] make the rules prohibiting such manipulative practices easier to enforce.'' [19] The commenter suggested that allowing broker-dealer orders to be executed through Auto-Ex would make the PCX ''more competitive with other options exchanges, thereby promoting competition among option exchanges, which [would] inure to the benefit of investors generally.'' [20] The commenter also indicated that the registration of Order Entry Firms and the list of prohibited practices under the proposed rule change would clarify and safeguard the use of Auto-Ex.[21]

Interactive Brokers and OutSource International objected to the proposal because, in their view, it imposed restrictions on the customer's investment activities and attempted to determine the customer's subjective intent in placing certain orders. The commenters suggested that the PCX should instead implement an objective systems/software change to Auto-Ex, similar to the SOES system of the National Association of Securities Dealers, Inc. (''NASD''). These software changes would automatically prevent a member from entering an order into Auto-Ex within fifteen seconds after receiving an Auto-Ex execution.[22] Both commenters argued that the proposal focuses on the subjective intent of individual customers and that there is no way to accurately make a determination that certain multiple orders are based on a single investment decision.[23] They further stated that the proposal makes a ''presumption'' that a single investment decision was made.[24] Furthermore, these two commenters argued that the proposed rule change does not provide a safe-harbor rule for customers for multiple orders transmitted more than fifteen seconds apart, and that there were also no procedural protections or remedies for customers whose trades are cancelled or price-adjusted in error.[25] They were concerned that the provision of the original proposed rule change allowing nullification of orders would allow exchange floor officials unlimited discretion to enforce the proposed rule and selectively cancel those trades that were unprofitable to market makers.[26]

Interactive Brokers stated that the PCX should not be able to ''reach past its members and regulate the manner in which customers themselves formulate and express their investment decisions.'' [27] This commenter also argued that the proposed rule change did not adequately address or provide solutions for other problems faced by market makers who are exposed to multiple orders in rapid-fire succession.[28] An individual commenter indicated that the proposal was overboard and should apply to orders for the same series and not the same class.[29]

IV. Discussion

After careful review, the Commission finds that the proposed rule change, as amended, except for the portion of the proposal relating to the execution of broker-dealer orders on Auto-Ex,[30] 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).[31] Specifically, the Commission finds that approval of the proposed rule change, except for the portion of the proposed rule change relating to the entry of broker-dealer orders on Auto-Ex, is consistent with section 6(b)(5)[32] of the Act in that it is designed to promote just and equitable principles of trade, to remove impediments and to perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest.

The Commission finds that the Exchange's proposed provisions under PCX Rule 6.87(a), codifying and defining the terms ''Auto-Ex,'' ''User,'' and ''Order Entry Firm,'' will help provide Auto-Ex participants with more clarity and guidance and a better understanding of the use of these terms as used in the PCX rules governing Auto-Ex.

The Commission also finds that the Exchange's requirement of registration of all Order Entry Firms may provide safeguards on the use of Auto-Ex. Under proposed PCX Rule 6.87(c), Order Entry Firms must register by entering into an Auto-Ex Order Entry Firm Application Agreement with the Exchange; comply with all PCX options trading rules and procedures; provide written notice to all Users regarding the proper use of Auto-Ex; and maintain adequate procedures and controls to allow Order Entry Firms to monitor and supervise the entry of electronic orders by all Users to prohibit the practices specified in paragraph (d) of the rule.

These prohibited practices are: (1) Entering in ineligible order; (2) dividing an order involving a single investment decision into multiple smaller lots for purposes of meeting the order size requirements; (3) entering orders via POETS to perform a market making function; and (4) effecting manipulative transactions. Commenters mainly raised concerns about the single investment decision presumption of the original proposal. The Exchange revised the proposal to provide an objective safe-harbor rule that would eliminate the subjective single investment decision presumption. Initially, the Exchange

account of such person or entity from being sent through the Exchange's Member Firm Interface for such period of time as the Exchange deems appropriate. Any system used by a Member to operate a Terminal must be separate and distinct from any system that may be used by a Member or any person associated with a Member in connection with market making functions.''

[17] *See* Morrison & Foerster Letter supporting the proposed rule change, *supra* note 5. *See also* Interactive Brokers Letter, Ianni E-Mail, and OutSource International Letter opposing the proposed rule change, *Id.*

[18] *See supra* note 4.

[19] *See* Morrison & Foerster Letter, *supra* note 5.

[20] *Id.*

[21] *Id.*

[22] *See* Interactive Brokers Letter and OutSource International Letter, *supra* note 5.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *See* Interactive Brokers Letter, *supra* note 5.

[28] This commenter noted that the proposal does not prevent customers from placing several orders through different accounts with different broker-dealers to avoid the provisions of the proposed rule change; and that the proposal only addresses successive orders from the same customer, and not ''the same problem arising from rapid, successive orders from different customers.'' *See id.*

[29] *See* Ianni E-Mail, *supra* note 5.

[30] *See supra* note 8.

[31] 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).

[32] 15 U.S.C. 78f(b)(5).

proposed a fifteen second time period in which multiple orders may not be entered on the behalf of the same beneficial owner, but it reserved the right to conclude that multiple orders entered outside of the fifteen second time period could still be considered a single investment decision. The Exchange wanted to prevent the splitting of orders by or on behalf of the same beneficial owner to meet Auto-Ex eligibility, whether these orders were entered within or outside the fifteen second time period.

In response to the commenters' concerns, however, the Exchange added an objective safe-harbor provision, PCX Rule 6.87(d)(2)(B), providing that all orders entered outside of any fifteen second time period for the account of the same beneficial owner will be deemed to be separate investment decisions, and therefore will not be presumed to be a part of a single investment decision.[33] The Commission believes that this safe-harbor rule for multiple orders entered after the fifteen second time period is necessary to provide Users of Auto-Ex with guidance and comfort that their entry of orders after fifteen seconds will not be presumed a single investment decision.

Furthermore, the Exchange responded to commenters' concerns by revising the proposed rule language to reflect that the proposal will only apply to multiple orders to trade the same option issue that are on the same side of the market (whether short or long) and multiple orders to trade the same option series. The Commission believes that this provision is appropriate and will allow Users of Auto-Ex more flexibility in placing their orders.

The Exchange also made several other modifications to respond to the commenters' concerns. The Exchange eliminated its proposed provision relating to the nullification of orders, which would have allowed PCX floor officials to execute only the first of orders equaling or adding up to the Auto-Ex size requirement and nullifying any others orders.[34] Furthermore, the Exchange revised its proposed rule text to clarify that it will preclude Order Entry Firms from dividing up or permitting an existing order from being divided up to make its parts eligible for entry into Auto-Ex.[35] The Commission believes that, by eliminating the proposed provision relating to the nullification of orders and retaining the prohibition against the splitting of orders by Order Entry Firms, Users of Auto-Ex will be provided with greater assurance that their orders will be executed. The Commission therefore finds that these revisions to the proposal are consistent with the public interest and the protection of investors.

Finally, the Commission recognizes that proposed PCX Rule 6.88(c), prohibiting the use of POETS to perform a market making function, is consistent with other rules adopted by other exchanges to preclude persons from performing a market making function unless they are registered as market makers.[36]

V. Accelerated Approval of Amendments No. 2 and 3

The Commission finds good cause for approving Amendments No. 2 and 3 to the proposed rule change, except for those portions relating to the execution of broker-dealer orders on Auto-Ex, prior to the thirtieth day after the amendments are published for comment in the **Federal Register** pursuant to section 19(b)(2) of the Act.[37] Both Amendments No. 2 and 3 alter the proposed rule language to address many of the commenters' concerns. Specifically, Amendment No. 2 adds a safe harbor provision for orders entered more than fifteen seconds apart; eliminates provisions that would have permitted the Exchange to nullify certain orders; incorporates a provision prohibiting the use of POETS to perform a market making function; and makes other minor technical changes. Amendment No. 3 simply cleans up minor punctuation and spacing problems in the proposed rule text. Because these amendments address the concerns raised by the commenters, the Commission believes it is not necessary to separately solicit comment on these amendments prior to approving this proposal. Moreover, the Commission finds that these changes to the proposed rule language are necessary to accomplish the intended goals of the Exchange's proposal and therefore believes that acceleration of Amendments No. 2 and 3 is appropriate.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendments No. 2 and 3, 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, N.W., Washington, D.C. 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–00–05 and should be submitted by March 16, 2001.

VII. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, and Amendments No. 2 and 3 thereto, except for portions relating to the execution of broker-dealer orders on Auto-Ex, are consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with section 6(b)(5).[38]

It Is Therefore Ordered, pursuant to section 19(b)(2) of the Act,[39] that the proposed rule change (SR–PCX–00–05) is approved, and Amendments No. 2 and 3 thereto are approved on an accelerated basis, except for portions relating to the entry of broker-dealer orders on Auto-Ex.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[40]

Margaret H. McFarland,

Deputy Secretary.

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[33] *See* Amendment No. 2, *supra note* 6.

[34] *See* Amendment No. 1, *supra note* 3.

[35] *See* Amendment No. 2, *supra note* 6.

[36] *See* Securities Exchange Act Release Nos. 43938 (February 7, 2001), 66 FR 10539 (February 15, 2001) (File No. SR–Amex–01–03); 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (File No. 10–127) (approving application of ISE for registration as a national securities exchange); and 43939 (February 7, 2001), 66 FR 10547 (February 15, 2001) (File No. SR–Phlx–01–05).

[37] 15 U.S.C. 78s(b)(2).

[38] 15 U.S.C. 78f(b)(5).

[39] 15 U.S.C. 78s(b)(2).

[40] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

Office of Inspector General

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