

dealers operating in the traditional marketplace, effecting a municipal transaction that does not involve making a recommendation, have interpreted fair dealing rules to require that they discover and disclose information from specified sources.”¹⁹

MSRB Response. The rule G-17 interpretive notice does not raise the standard of care required by dealers in non-recommended transactions with customers. The existing interpretive statement on rule G-17 can be construed, on its face, to obligate dealers to disclose all material information about a municipal security transaction, without regard to how accessible the information is to the dealer. The proposed rule change makes clear that the obligation of the dealer to disclose all material information is limited to such information that is reasonably accessible.

The MSRB recognizes that at times dealers may have difficulty ensuring that they have taken into account all material information available from established industry sources when disclosing material information to customers. The MSRB has been working with the industry to improve dealers' ability to access all material information concerning municipal securities transactions so that dealers can better meet their regulatory responsibilities. However, given that the disclosure system is currently not as accessible to most customers as it is to dealers, the MSRB continues to believe that dealers must be responsible for disclosing information available from established industry sources to customers.²⁰

Providing Electronic Access

Comments Received. MuniCenter is concerned that an obligation to disclose is “susceptible to an interpretation that the broker-dealer must actually deliver or otherwise communicate all material facts derived from established industry sources.”²¹ MuniCenter states that it believes that providing electronic access to information is consistent with the obligation to disclose information and would like confirmation of that view by the MSRB.

MSRB Response. The MSRB does not believe it would be appropriate for it to issue a blanket statement to the effect

that providing electronic access to information always fulfills a dealer's obligation to disclose this information to a customer. Nevertheless, the MSRB believes that under appropriate facts and circumstances (e.g., the dealer is not shifting the cost of acquiring the information to the customer, the link is prominent and functioning and the link provides information that is comprehensible to the customer) providing electronic access to information is consistent with the dealer's disclosure obligation. Therefore, the MSRB has added a statement to the rule G-17 interpretive notice to the effect that the MSRB believes that the provision of electronic information to customers who elect to transact in municipal securities on an electronic platform is generally consistent with a dealer's obligation to disclose information, but whether such access constitutes effective disclosure ultimately depends upon the particular facts and circumstances present.

III. Date of Effectiveness of the Proposed Rule Change 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 self-regulatory organization consents, the Commission will:

- (a) By order approve such 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, including whether the proposed rule change is consistent with the Exchange Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in

the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the MSRB's principal offices. All submissions should refer to File No. SR-MSRB-2002-01 and should be submitted by March 5, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²²

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45404; File No. SR-NYSE-2002-06]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Amending Exchange Rule 351 Concerning the Reporting of Criminal Offenses by Members and Member Organizations to the Exchange

February 6, 2002.

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 January 9, 2002, 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, 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 change from interested persons.

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

The Exchange proposes to amend NYSE Rule 351 that would narrow the scope of reportable criminal offenses reported by members and member organizations to incidents, which are more germane to the conduct of a securities-related business and would, therefore, minimize the number of immaterial filings and maximize the effective use of resources committed to fulfilling self-regulatory responsibilities at the Exchange. Moreover, the proposed amendment would capture the reporting of arrests for which any subsequent conviction would subject the individual to a statutory

¹⁹ MuniCenter, *supra* note 15.

²⁰ The MSRB's proposed SMMP interpretive notice acknowledges that certain customers (*i.e.*, SMMPs) have access to established industry sources and would allow dealers to effect non-recommended secondary market transactions with SMMPs without making the affirmative disclosures required under rule G-17. See File No. S-MSRB-2002-02.

²¹ MuniCenter, *supra* note 15.

²² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

disqualification under section 3(a)(39) of the Act.³

The text of the proposed rule change appears below. New text is in italics; deletions are in brackets.

Reporting Requirements

Rule 351

(a) (1)—(4) no change.

(a) (5) is arrested, arraigned, indicted or convicted of, or pleads guilty to, pleads no contest to, [any criminal offense (other than minor traffic violations)] *any felony; or any misdemeanor that involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds, or securities, or substantially equivalent activity in a domestic or foreign court.*

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 Exchange 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 Exchange 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

The Exchange proposes to amend NYSE Rule 351(a)(5) with respect to the reporting of criminal offenses by members and member organizations to the Exchange. According to the Exchange, one of its objectives, as provided by the Exchange's Constitution, is to "maintain high standards of commercial honor and integrity among its members, allied members, member firms and member corporations." * * * To this end, NYSE Rule 351(a)(5) requires that members and member organizations promptly report to the Exchange whenever a member, member organization, or any member, allied member or registered or non-registered employee associated with such member or member

organization is arrested, arraigned, indicted, convicted of, pleads guilty to or pleads no contest to, any criminal offense (other than a minor traffic violation).

According to the Exchange, the reporting requirement under NYSE Rule 351(a)(5) is intended to assist it ensure that its members, allied members and member organizations possess commercial integrity and can function in a fiduciary capacity. However, the Exchange believes that the definition of a reportable offense under NYSE Rule 351(a)(5) is too broad in its current form and departs from the prevailing industry disclosure requirements.⁴ The Exchange states that it has required member organizations to report a wide range of criminal offenses to the Exchange. In fact, the Exchange believes that the majority of offenses currently reported to the Exchange do not relate to the commercial integrity of the industry. The Exchange states that such reported offenses are not business-related, such as fraud, embezzlement, theft or forgery. More often, the Exchange states, the reported offenses relate to violations of the motor vehicle code, such as drunk driving offenses.

As a result, the Exchange believes the overly broad reference to "criminal offense" under NYSE Rule 351(a)(5) currently requires applicants to report information that is of no regulatory interest to the Exchange, is not in keeping with other industry regulatory requirements and places unnecessary demands on Exchange staff since they have been required to review these unnecessary filings. For example, the Exchange asserts that 95% of the 154 reported arrests in the first quarter of 2001 were not felonies or business-related offenses. In fact, 50% of the reported arrests involved drunk driving offenses. Under the proposed amendment, the Exchange states that these types of arrests would not need to be reported to the Exchange.

According to the Exchange, the proposed rule change would narrow the scope of reportable criminal offenses required by members and member organizations to incidents, which are

more germane to the conduct of a securities-related business and would, therefore, minimize the number of immaterial filings and maximize the effective use of resources committed to fulfilling self-regulatory responsibilities at the Exchange. However, the Exchange notes that the proposed rule change would still require that every felony be reported to the Exchange, while only the proposed enumerated misdemeanors need be reported.⁵ Moreover, the Exchange believes that the proposed rule change would capture the reporting of arrests for which any subsequent conviction would subject the individual to a statutory disqualification under Section 3(a)(39)⁶ of the Act.

(2) Statutory Basis

The Exchange believes the basis for the proposed rule change, as amended, is the requirement under sections 6(b)(5)⁷ and 6(c)(2) of the Act.⁸ Section 6(b)(5)⁹ requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and national market system, and in general, to protect investors and the public interest. Section 6(c)(2)¹⁰ permits an exchange to deny membership to a registered broker-dealer or bar association of a natural person with a registered broker-dealer who is subject to a statutory disqualification.

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

The Exchange believes that the proposal does not impose any burden on competition 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

Comments were neither solicited nor received by the Exchange.

III. Date of Effectiveness of the Proposed Rule Change 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)

⁵ Telephone conversation between Susan Light, Vice President, NYSE, and Katherine England, Assistant Director, Division of Market Regulation, Commission, on January 31, 2002.

⁶ 15 U.S.C. 78c(a)(39).

⁷ 15 U.S.C. 78f(b)(5).

⁸ 15 U.S.C. 78f(c)(2).

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ 15 U.S.C. 78f(c)(2).

³ 15 U.S.C. 78c(a)(39).

⁴ Under the current version of the Form U-4, Question 22A(1) reads as follows: "Have you ever (a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to any felony? (b) been charged with any felony?" Question 22B(1) reads as follows: Have you ever (a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic or foreign court to a misdemeanor involving: investments or an investment-related business, fraud, false statements or omissions, wrongful taking of property, or bribery, forgery, counterfeiting or extortion, or a conspiracy to commit any of these offenses? (b) been charged with a misdemeanor specified in 23B(1)(a)?

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 such 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, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the 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 filings will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-NYSE-2002-06 and should be submitted by March 5, 2002.

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

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45392; File No. SR-PCX-2001-50]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Exchange, Inc. Relating to Rules on Collective Actions of Market Makers

February 5, 2002.

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 December 13, 2001, 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, II, and III below, which Items have been prepared by the PCX. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The PCX is proposing to adopt rules pertaining to collective actions of options market makers that may be made in determining spreads or prices in particular option series. The text of the proposed rule change is set forth below. Additions are in italics; deletions are in brackets.

¶4935 Obligations of Market Makers

Rule 6.37(a)-(c)—No change.

(d)—[Reserved]³

(e) Prohibited Practices and Procedures.

(1) *Any practice or procedure whereby Market Makers trading any particular option issue determine by agreement the spreads or option prices at which they will trade that issue is prohibited.*

(2) [Reserved]

(f) *Notwithstanding the prohibitions set forth in Subsection (e), the LMM and members of the trading crowd are permitted to act collectively as set forth below:*

(1) *The LMM may receive input from the members of the trading crowd on any one or more of the following variables of the formula the LMM uses to generate automatically updated market quotations in each option issue: (A) Options pricing calculation model; (B) volatility; (C) interest rates; and (D) dividends (both declared and anticipated). However, members of the trading crowd are not required to provide input to the LMM on any of these variables. Notwithstanding any input that the members of the trading crowd may have provided with regard to these variables, it is within the LMM's sole discretion to make the final independent decision regarding the variables to be used in operating the automated quotation system. LMMs using Exchange-approved proprietary automated quotation updating systems are not required to disclose proprietary*

information concerning the variables used by those systems; provided, however, that LMMs may disclose the variables themselves pursuant to Rule 6.82(c)(8).

(2) *The obligation of Market Makers to make competitive markets does not preclude the LMM and members of the trading crowd from making a collective response to a request for a market, provided the member representing the order requests such a response in order to fill a large order. For purposes of this rule, a large order is an order for a number of contracts that is greater than the eligible order size for automatic execution pursuant to Rule 6.87.*

(3) *In conjunction with their obligations as a responsible broker or dealer pursuant to Rule 6.86 and SEC Rule 11Ac1-1, the LMM and Market Makers in the trading crowd may collectively agree to the best bid, best offer and aggregate quotation size required to be communicated to the Exchange pursuant to Rule 6.86(c).*

Lead Market Makers

Rule 6.82(a)-(b)—No change.

(c) Obligations of Lead Market Makers:

Each LMM must meet the following obligations:

(1)-(7)—No change

(8) *LMMs are responsible for establishing the variables in the formula used to generate automatically updated quotations in each option issue or series. The LMM may disclose to the members of the trading crowd the following variables of the formula used to generate automatically updated market quotations in each option issue: (A) Options pricing calculation model; (B) volatility; (C) interest rate; and (D) dividends (both declared and anticipated).*

[(8)-(13)]- (9)-(14)—No change.

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 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 IV below. The PCX has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Proposed Rule 6.37(d) is pending SEC approval. See File No. SR-PCX-99-13.

¹¹ 17 CFR 200.30-3(a)(12).