

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47458; File No. SR-NYSE-2002-50]

Self-Regulatory Organizations; Order Approving Proposed Rule Change, as Amended by Amendment No. 1 Thereto, by the New York Stock Exchange, Inc. To Adopt Amendments to Exchange Rules 450 ("Restrictions on Giving of Proxies"), 451 ("Transmission of Proxy Material"), 452 ("Giving Proxies by Member Organizations"), and 465 ("Transmission of Interim Reports and Other Material")

March 6, 2003.

On October 16, 2002, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change to amend NYSE Rule 450 ("Restriction on Giving of Proxies"), NYSE Rule 451 ("Transmission of Proxy Material"), NYSE Rule 452 ("Giving Proxies by Member Organizations"), and NYSE Rule 465 ("Transmission of Interim Reports and Other Material") to allow authorized state-registered investment advisers to receive and vote proxy materials on behalf of beneficial owners. On December 19, 2002, the NYSE amended the proposal to define the term "state" in proposed NYSE Rule 451 by reference to the Investment Advisers Act of 1940 ("Advisers Act"),³ instead of the Act.⁴

The Commission published the proposed rule change, as amended, for comment in the *Federal Register* on January 28, 2003.⁵ The Commission received one comment letter relating to the proposal.⁶ This order approves the amended proposal.

Currently, NYSE Rules 450, 451, 452, and 465 provide beneficial owners the ability to authorize investment advisors

to receive proxy material, other related issuer material and to vote proxies on their behalf, if such investment advisers are registered under the Advisers Act, exercise investment discretion pursuant to an advisory contract, and have been designated to the member organization in writing by the beneficial owner.

Title III of the National Securities Markets Improvement Act of 1996 (the "Coordination Act") reallocated regulatory responsibilities for investment advisers between the Commission and the states.⁷ Generally, the Coordination Act provides for Commission regulation of advisers with \$25 million or more of assets under management, and state regulation of advisers with less than \$25 million of assets under management. As a result, the Exchange believes that the number of advisers eligible to be registered with the Commission has been reduced by approximately two-thirds. Consequently, because NYSE's current rules require the authorized investment adviser to be registered under the Advisers Act, beneficial owners cannot designate a large number of investment advisers (those with less than \$25 million under management) to exercise investment discretion pursuant to an advisory contract, or to receive and vote proxy materials on their behalf. The proposed amendments would allow such authorization to be extended to advisers registered under state law.

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 exchange⁸ and, in particular, the requirements of section 6 of the Act.⁹ The Commission finds that the proposed rule change, as amended, is consistent with section 6(b)(5) of the Act,¹⁰ which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade and, in general, to protect investors and the public interest. The Commission believes that amending NYSE Rules 450, 451, 452, and 465 to allow authorized state-registered advisers to receive and vote proxy materials on behalf of the beneficial owner, would allow for the reasonable expectation that all registered advisers, state and federal, subject to due authorization and regulation, be

permitted to receive and vote proxy materials on their behalf. The Commission also believes that this change recognizes, and is consistent with, the regulatory scheme set up for the registration of investment advisors under state and federal law pursuant to the Coordination Act.¹¹

NYSE's rules will continue to require that such investment advisers are exercising investment discretion on behalf of the beneficial owner pursuant to an advisory contract, and have been designated to the member organization in writing by the beneficial owner. These requirements should help to ensure that any state registered adviser is acting on behalf of the beneficial owner.

It is therefore Ordered, pursuant to section 19(b)(2) of the Act,¹² that the proposed rule change (SR-NYSE-2002-50), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47453; File No. SR-PCX-2003-07]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Relating to Changes in Marketing Fees Charged to Its Market Makers

March 6, 2003.

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 February 24, 2003, the Pacific Exchange, Inc. ("PCX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items

¹¹ See NASAA Comment Letter, *supra* note 6. In its comment letter, the NASAA stated that while federal and state-registered advisers are distinguished based on their levels of assets under management, both federal and state-registered advisers generally perform similar functions. According to the NASAA, while not all clients may want their adviser to vote on their behalf, NASAA believes this option should be available to all investors.

¹² 15 U.S.C. 78s(b)(2).

¹³ 17 CFR 200.30'3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 80b.

⁴ See letter from Darla Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated December 19, 2002 ("Amendment No. 1").

⁵ See Securities Exchange Act Release No. 47215 (January 17, 2003), 68 FR 4263.

⁶ See letter from Christine A. Bruenn, NASAA President and Maine Securities Administrator, North American Securities Administrators Association, Inc. ("NASAA"), to Jonathan G. Katz, Secretary, Commission, dated February 18, 2003 ("NASAA Comment Letter"). In its comment letter, the NASAA expressed support for the proposal. See also *infra* note 11.

⁷ 62 FR 28112 (May 22, 1997); Release No. IA-1633, File No. S7-31-96.

⁸ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁹ 15 U.S.C. 78f.

¹⁰ 15 U.S.C. 78f(b)(5).

have been prepared by the PCX.³ On February 28, 2003, PCX submitted Amendment No. 1 to the proposed rule change.⁴ 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 change its marketing fee for certain options and to adopt new marketing fees for recently listed options. The text of the proposed rule change is available at the principal offices of the 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, the PCX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had 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.

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

1. Purpose

The PCX recently adopted a payment-for-order-flow program under which it charges a marketing fee ranging from \$0 to \$1.00 per contract on a per-issue basis.⁵ The PCX segregates the funds from this fee by trading post and makes the funds available to Lead Market Makers ("LMMs") for their use in attracting orders in the options traded at the posts. The PCX charges the

marketing fees as set forth in its Schedule of Marketing Charges.

The PCX is proposing to change the marketing fee for certain options as set forth in the Schedule of Marketing Charges beginning at the commencement of the March trade month and continuing until further notice. The PCX proposes to change only the amounts of the fees that it charges for transactions in the options that are included in the proposed Schedule of Marketing Charges.⁶ Any fees currently being charged for transactions in options that are not listed in this amendment to the Schedule of Marketing Charges would not be affected by the proposed rule change. The PCX believes that its proposed rule change is reasonable and equitable because it is designed to enable the PCX to compete with other markets in attracting options business.

The PCX's marketing fee program applies only to option issues classified by the PCX as a Top 250 issue. The PCX defines a Top 250 issue as one of the 250 most actively traded option issues on a national basis. For each current month, the PCX's determination of whether an equity option ranks in the top 250 most active issues will be based on volume statistics for the three calendar months of trading activity beginning four months prior to the current month.

2. Statutory Basis

The PCX believes that its proposal to amend its schedule of dues, fees and charges is consistent with Section 6(b) of the Act⁷ in general, and furthers the objectives of Section 6(b)(4) of the Act⁸ in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among PCX members.

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

The PCX does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

⁶ The Commission notes that the PCX payment-for-order-flow program applies only to Top 250 issues. For purposes of the payment-for-order-flow program, the PCX recalculates the Top 250 issues quarterly, based upon volume statistics for the three-month period that began four months earlier. The PCX has updated its Schedule of Marketing Charges to identify the changes to the marketing fees that the PCX is charging for the March, April, and May 2003 trading months, as part of its payment-for-order-flow program. See Note 4 *supra*.

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4).

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

PCX neither solicited nor received written comments concerning the proposal.

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

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the PCX, it has become effective pursuant to section 19(b)(3)(A) of the Act⁹ and Rule 19b-4(f) thereunder.¹⁰ At any time within 60 days after the filing of the proposed rule change, the Commission may summarily abrogate the 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. For purposes of calculating the 60-day abrogation period, the Commission considers the proposed rule change to have been filed on February 28, 2003, the date Amendment No. 1 was filed.

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 at the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the PCX. All submissions should refer to File No. SR-PCX-2003-07 and should be submitted by April 3, 2003.

³ The Commission notes that in its cover letter accompanying the proposed rule change, PCX inadvertently referred to the filing as SR-PCX-2003-06.

⁴ See letter from Mai S. Shiver, Senior Attorney, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated February 28, 2003, received via facsimile on February 28, 2003. In Amendment No. 1, the PCX clarified that the marketing fee program applies only to option issues classified by the PCX as among the Top 250 issues, and described how the Top 250 issues are determined. In addition, the PCX supplemented its Schedule of Marketing Charges to include a list of 19 options issues for which the marketing fee has been reduced from \$0.50 to \$0.00.

⁵ See Exchange Act Release No. 44830 (September 21, 2001), 66 FR 49728 (September 28, 2001) (SR-PCX-2001-37).

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f).

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. 34-47457; File No. SR-PCX-2003-10]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Relating to the Eligibility of Timed Orders During the Opening Auction and Market Order Auction, Amending PCXE Rules 7.34 and 7.35

March 6, 2003.

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 March 3, 2003, the Pacific Exchange, Inc. ("PCX") filed with the Securities and Exchange Commission the proposed rule change as described in Items I and II, below, which the PCX has prepared. 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, through its wholly owned subsidiary PCX Equities, Inc. ("PCXE"), proposes to amend its rules governing the Archipelago Exchange ("ArcaEx"), the PCXE's equities trading facility, by: (1) Amending PCXE Rule 7.34(d) to clarify that a specific type of Limited Price Order; namely a Timed Order³ designated as good from 5 a.m. (Pacific Time) or good from 6:30 a.m. (Pacific Time), will be excluded from eligibility for execution during the Opening Auction and Market Order Auction, respectively; and (2) amending PCXE Rule 7.35(a) through (c) to exclude specified Timed Orders during the applicable auctions. The text of the proposed rule change is below. New text is italicized.

Rule 7—Equities Trading

Orders and Modifiers

Trading Sessions

Rule 7.34(a)–(c)—No change.

(d) Order Permitted in Each Session.

(1) During the Opening Session:

(A)–(F)—No change.

(G) *Limited Price Orders are eligible for execution during the Opening Session; provided, however, a Timed Order designated for the Opening Session and designated as good from 5 am (Pacific Time) is not eligible for execution during the Opening Auction. Similarly, a Timed Order designated for the Opening Session and designated as good from 6:30 am (Pacific Time) is not eligible for execution during the Market Order Auction*

(H)—No change.

(2)–(3)—No change.

(e)–(f)—No change.

Opening Session Auctions

Rule 7.35(a) Order Entry and Cancellation Before Opening Auction

(1)—No change.

(2) Only Limited Priced Orders designated for the Opening Session will be eligible for the Opening Auction. *However, a Limited Price Order designated for the Opening Session and entered as a Timed Order good from 5 am (Pacific Time), is not eligible for execution during the Opening Auction. Market orders entered before the Opening Auction or during the Opening Session will participate in the Market Order Auction. However, a Limited Price Order designated for the Opening Session and entered as a Timed Order good from 6:30 am (Pacific Time), is not eligible for execution during the Market Order Auction. Limited Price Orders, including Timed Orders, designated for the Core Trading Session and not designated for the Opening Session will become eligible for execution at the commencement of the Market Order Auction pursuant to Rule 7.35(c).*

(3)–(4)—No change.

(b) Opening Auction.

(1) At 5 am (Pacific Time), Limited Priced Orders designated for the Opening Session are matched and executed in the Opening Auction; *provided, however, a Limited Price Order designated for the Opening Session and entered as a Timed Order good from 5 am (Pacific Time), is not eligible for execution during the Opening Auction.*

(2)–(3)—No change.

(4) *A Limited Price Order designated for the Opening Session and entered as a Timed Order good from 6:30 am (Pacific Time) is not eligible for*

execution during the Market Order Auction.

(c)–(f)—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 had received. 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 those statements.

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

1. Purpose

ArcaEx commenced operations on March 22, 2002, replacing the PCXE's traditional trading floor facilities. As part of its continuing review of the system's functionality and its duty to ensure the reporting of current, accurate, and consistent information regarding the Indicative Price Match⁴ and Imbalances⁵ on ArcaEx, the PCXE proposes to amend its rule to exclude Timed Orders designated as good from 5 a.m. (Pacific Time) or 6:30 a.m. (Pacific Time) from execution during the Opening Auction and Market Order Auction, respectively.

ArcaEx operates three trading sessions each day the PCXE is open for business.⁶ The proposed rule change concerns only the Opening Session. The Opening Session begins at 5 a.m. (Pacific Time) and concludes at 6:30 a.m. (Pacific Time) with the

⁴ PCXE Rule 1.1(r) provides, in part: "[f]or purposes of the Opening Auction [and] the Market Auction, as the case may be, * * * the term 'Indicative Match Price' shall mean for each security (1) the price at which the maximum volume of shares are executable; or (2) if there are two or more prices at which the maximum volume of shares are executable, the price that is closest to the closing price of the previous day's normal market hours * * * as determined by the Consolidated Tape will establish the opening price, provided that such price would trade through an eligible Limited Price Order designated for such an auction, then the opening price will occur at the best price level available where no trade through occurs."

⁵ PCXE Rule 1.1(q) provides, in part: "[f]or purposes of the Opening Auction [and] the Market Auction * * * as the case may be, the term 'Imbalance' shall mean the number of buy or sell shares that can not be matched with other shares at the Indicative Match Price at any given time."

⁶ The three trading sessions are (1) the Opening session; (2) the Core Session; and (3) the Late Trading Session. See PCXE Rule 7.34(a).

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² CFR 240.19b-4.

³ See PCXE Rule 7.31(q) (definition of a "Timed Order").