

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

The Exchange is proposing to lower the cap on each payment-for-order-flow fund from \$550,000 to \$450,000. The text of the proposed rule change is available at the Exchange 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 Exchange 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 Exchange 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

The Exchange operates a payment for order flow program as approved by the Commission.<sup>3</sup> This program is currently funded through a \$.55 fee paid by ISE market makers for each customer contract they execute. The Exchange also has established a ceiling of \$550,000 in each of the ten payment-for-order-flow funds it maintains.<sup>4</sup> The Exchange states that it seeks to ensure that the ten payment-for-order-flow funds are sufficiently high, but no higher than necessary. The Exchange states that it continues to collect more money for the funds than its Primary Market Makers have paid out. Therefore, the Exchange proposes to reduce the ceiling on each payment-for-order-flow fund from \$550,000 to \$450,000,

<sup>3</sup> See Securities Exchange Act Release No. 43833 (January 10, 2001), 66 FR 7822 (January 25, 2001) (approving File No. SR-ISE-00-10).

<sup>4</sup> See Securities Exchange Act Release Nos. 45128 (December 4, 2001), 66 FR 64325 (December 12, 2001) (File No. SR-ISE-2001-31), 45772 (April 17, 2002), 67 FR 20563 (April 25, 2002) (File No. SR-ISE-2002-09), 45857 (May 1, 2002), 67 FR 30988 (May 8, 2002) (File No. SR-ISE-2002-12), and 46976 (December 9, 2002), 67 FR 77116 (December 16, 2002) (File No. SR-ISE-2002-26). Under ISE Rule 802(b), the Exchange has divided the options it trades into ten groups, with one Primary Market Maker assigned to each group. The Exchange maintains a payment-for-order-flow fund for each group, consisting of the fees collected from market makers trading options in that group. The Primary Market Maker for the group is responsible for arranging and making all payments to Electronic Access Members for order flow sent to the Exchange in options in that group.

because it believes that it can adequately maintain this program with the reduced ceiling.<sup>5</sup>

#### 2. Statutory Basis

The basis for this proposed rule change is the requirement of section 6(b)(4) under the Act<sup>6</sup> that an exchange have an equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

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

The Exchange believes that the proposed rule change will not impose any burden on competition that is 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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act<sup>7</sup> and Rule 19b-4(f)(2) thereunder<sup>8</sup> because it changes an ISE fee. At any time within 60 days of the filing of such 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.

## 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.,

<sup>5</sup> The Commission notes that the payment for order flow fee would be suspended for a group of options when the fund balance for the group reaches \$450,000, but would be reinstated when any such fund balance falls below \$450,000. See Securities Exchange Act Release No. 45857 (May 1, 2002), 67 FR 30988 (May 8, 2002) (File No. SR-ISE-2002-12).

<sup>6</sup> 15 U.S.C. 78f(b)(4).

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> 17 CFR 19b-4(f)(2).

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 the filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-ISE-2003-23 and should be submitted by October 27, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

Jill M. Peterson,

Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48569; File No. SR-PCX-2003-52]

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Relating to the Exchange's Designated Examining Authority Fee Exemption

September 30, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 24, 2003, the Pacific Exchange, Inc. ("PCX" 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 is proposing to amend the regulatory fee portion of its Schedule of Fees and Charges ("Fees")

<sup>9</sup> 17 CFR 200.30-3(a)(12).

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

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

in order to revise its Designated Examination Authority ("DEA") Fee exemption. The text of the proposed rule change is available at 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 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 is proposing to amend the regulatory fee portion of its Fees in order to revise the DEA Fee exemption. The Exchange currently charges a DEA fee in order to recover costs associated with regulation relative to those DEA member firms that do not conduct a certain portion of their trading activity on the PCX. The Exchange requires all traders to pay an initial registration fee of \$75 per trader and an annual fee thereafter of \$250 per trader. In addition, a \$2,000 per month examination fee applies to firms for whom the PCX is the DEA. For firms that conduct a substantial portion of their business on the Exchange floor, however, these costs are deemed to be offset by contract revenue. Thus, the Exchange allows an exemption to those member organizations that can demonstrate that at least 25% of their income was derived from on-floor activities.

The Exchange seeks to make a minor amendment to the existing DEA Fee exemption. The revised DEA Fee exemption will allow an exemption for any PCX Registered Floor Broker or Market Maker<sup>3</sup> that effects at least 25% of all securities transactions, as measured in contract or share volume, on the PCX Floor or any other PCX Options trading facility, including PCX Plus. The Exchange believes that this amendment more accurately reflects the application of the exemption and

references the Exchange's new trading platform, PCX Plus. The Exchange states that the underlying purpose of the exemption, recovery of costs<sup>4</sup> associated with providing regulatory services to off-floor trading firms that do not conduct their trading activity on the Exchange, remains unchanged.

#### 2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,<sup>5</sup> in general, and Section 6(b)(4) of the Act,<sup>6</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members.

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

The Exchange 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.

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

Written comments on the proposed rule change were neither solicited nor received.

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

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>7</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder,<sup>8</sup> because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days after 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.

## 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.

<sup>4</sup> These include costs related to advising firms on financial reporting requirements and compliance with PCX and Commission rules. There are also extensive travel costs and more complex regulation related to such firms.

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

<sup>6</sup> 15 U.S.C. 78f(b)(4).

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>8</sup> 17 CFR 240.19b-4(f)(2).

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 PCX. All submissions should refer to file number SR-PCX-2003-52 and should be submitted by October 27, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

Jill M. Peterson,

Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48565; File No. SR-PCX-2003-20]

### Self-Regulatory Organizations; Pacific Exchange, Inc.; Order Approving Proposed Rule Change and Amendments No. 1 and 2 and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 3 Relating to the Limitation of Liability of the Options Clearing Corporation to Exchange Members

September 30, 2003.

#### I. Introduction

On April 28, 2003, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to adopt PCX Rule 13.5. On August 4, 2003, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> On August 7, 2003, the PCX

<sup>9</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See letter from Tania J. Cho, Staff Attorney, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation

<sup>3</sup> Pursuant to PCX Rule 6.1(c)(2), the term "Market Maker" includes Lead Market Maker, Remote Market Maker, Floor Market Maker and Supplemental Market Maker.