

with a cost-effective means to establish direct connections, which can be expected to improve the speed and certainty of execution in the market, to the benefit of all market participants.

#### *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.

#### *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**

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act<sup>8</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder,<sup>9</sup> because it establishes or changes a due, fee, or other charge. 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.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2004-158 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-158. This file

number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2004-158 and should be submitted on or before December 6, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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### **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-50643; File No. SR-PCX-2004-98]**

#### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. To Extend Until 1:15 (Pacific Time) the Core Trading Session and Change the Closing Auction Time for Certain ETFs**

November 5, 2004.

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 October 12, 2004, 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 PCX. On November 3, 2004, the PCX filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Exchange proposed the rule change under section 19(b)(3)(A) of the Act<sup>4</sup> and Rule 19b-4(f)(6) thereunder,<sup>5</sup> which renders it effective upon filing.<sup>6</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, 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 Core Trading Session rule (PCXE Rule 7.34(a)(2)) and its Closing Auction rule (PCXE 7.35) as they apply to certain Exchange Traded Funds ("ETFs").

The text of the proposed rule change, as amended, is below. Proposed new language is in *italics*; proposed deletions are in *brackets*.

\* \* \* \* \*

#### **Rule 7.34 Trading Sessions**

(a) (1) No change.

(2) Core Trading Session. The Core Trading Session shall begin for each security at 6:30:00 am (Pacific Time) or at the conclusion of the Market Order Auction, whichever comes later, and conclude at 1:00:00 pm (Pacific Time).

*(A) The Core Trading Session for the Exchange Traded Funds, defined in PCXE Rules 5.1(b)(13), 5.2(j)(3), and 8.100, shall conclude at 1:15:00 pm (Pacific Time) unless otherwise determined by the Corporation.*

(3) No change.

(b)-(f) No change.

#### **Rule 7.35 Auctions**

(a)-(d) No change.

(e) (1)-(3) No change.

(A)-(C) No change.

*(D) Notwithstanding other provisions of PCXE Rule 7.35(e):*

*i. The Closing Auction for the Exchange Traded Funds defined in PCXE Rules 5.1(b)(13), 5.2(j)(3), and*

<sup>3</sup> See Letter from Mai Shiver, Director, Regulatory Policy, PCX, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated November 2, 2004 ("Amendment No. 1"). Amendment No. 1 replaced and superseded the original filing in its entirety.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>5</sup> 17 CFR 240.19b-4(f)(6).

<sup>6</sup> For purpose of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under section 19(b)(3)(C) of the Act, the Commission considers that period to commence on November 3, 2004, the date that the PCX filed Amendment No. 1.

<sup>8</sup> 15 U.S.C. 78s(b)(3)(a)(ii).

<sup>9</sup> 17 CFR 240.19b-4(f)(2).

<sup>10</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.

8.100 and determination of the Closing Auction Price as defined in PCXE Rule 7.35(e)(3) will commence at 1:15 p.m. (Pacific Time) unless otherwise determined by the Corporation.

ii. Between 1:13 p.m. (Pacific Time) and the conclusion of the Closing Auction, Market-On-Close and Limit-On-Close Orders for the Exchange Traded Funds defined in PCXE Rules 5.1(b)(13), 5.2(j)(3), and 8.100 may not be cancelled.

iii. Between 1:13 pm (Pacific Time) and the conclusion of the Closing Auction, Market-on-Close Orders and Limit-on-Close Orders for the Exchange Traded Funds defined in PCXE Rules 5.1(b)(13), 5.2(j)(3), and 8.100 may not be entered on the same side as the Imbalance. Market-on-Close Orders and Limit-on-Close Orders for these Exchange Traded Funds that create equilibrium and thereafter convert the Imbalance from a buy to a sell (or convert the Imbalance from a sell to a buy) Imbalance will be rejected.

\* \* \* \* \*

## 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

As part of its continuing efforts to enhance participation on its Archipelago Exchange ("ArcaEx") facility, the PCX is proposing to include certain ETFs<sup>7</sup> in its Closing Auction process<sup>8</sup> and to delay the commencement of the Closing Auction

and the conclusion of the Core Trading Session<sup>9</sup> for these ETFs. Currently the Closing Auction commences at the end of regular trading hours<sup>10</sup> for all securities on ArcaEx other than ETFs. Unlike other securities in which regular trading hours cease at 1 p.m. (Pacific time), ETFs generally trade on other exchanges until 1:15 p.m. (Pacific time). Accordingly, the Exchange seeks to modify its Closing Auction start time for the ETFs defined in PCXE Rules 5.1(b)(13), 5.2(j)(3), and 8.100 to 1:15 p.m. (Pacific Time) unless otherwise determined. Consistently, the Exchange seeks to change the conclusion of the Core Trading Session for this same group of ETFs to 1:15:00 pm (Pacific Time) to coincide with the time of the closing session.

In conjunction with modifying the Closing Auction start time, the PCX seeks to modify the timing of the determination of the Closing Auction Price as described in PCXE Rule 7.35(e)(3) to 1:15 p.m. (Pacific time) for these ETFs. In addition, the Exchange seeks to modify the freeze period for entering Market-on-Close and Limit-on-Close Orders for the Closing Auction as defined in PCXE Rule 7.35(e)(2)(iii) to 1:13 p.m. (Pacific time) for these ETFs in order to limit the freeze period to two minutes before the Closing Auction, as is the case for the Closing Auctions for other securities. All other Closing Auction times described in PCXE Rule 7.35(e) will remain unchanged. For example, the dissemination of the Indicative Match Price<sup>11</sup> and Imbalances<sup>12</sup> associated with the Closing Auction for these ETFs as described in PCXE Rule 7.35(e)(1) will commence at 12 p.m. (Pacific time) and end upon the conclusion of the Closing Auction. Similarly, the determination of re-opening after trading halts as described in PCXE Rule 7.35(f) for these ETFs will be consistent with other securities traded on ArcaEx.

The PCX believes that implementing these rules to affect commencement times for the Closing Auctions and conclusion times for Core Trading Sessions for certain ETFs will provide investors and ETP Holders<sup>13</sup> with greater opportunities for executing ETF orders at the close and will result in the Closing Auction being priced for such securities within the range of prices

then found at the end of the day's regular trading session.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,<sup>14</sup> in general, and furthers the objectives of section 6(b)(5) of the Act,<sup>15</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

#### 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

PCX has designated that the proposed rule change as a "non-controversial" rule change pursuant to section 19(b)(3)(A) of the Act<sup>16</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>17</sup> The Exchange has stated that the foregoing rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest.<sup>18</sup>

The PCX has requested that the Commission waive the 30-day operative delay. The Commission believes that

<sup>7</sup> The three ETFs that the Exchange seeks to include in this proposal are all subject to the delayed closing auction commencement time on the American Stock Exchange ("Amex"), and are as follows: Unit Investment Trusts as defined in PCXE Rule 5.1(b)(13) (Amex Rule 1, Commentary .03); Investment Company Units as defined in PCXE Rule 5.2(j)(3) (Amex Rule 1000A, Commentary .02(f)—known as Index Fund Shares); and Portfolio Depositary Receipts ("PDRs") as defined in the PCXE Rule 8.100 (Amex Rule 1000, Commentary .02).

<sup>8</sup> See PCXE Rule 7.35(e).

<sup>9</sup> See PCXE Rule 7.34(a)(2).

<sup>10</sup> PCXE Rule 7.35(e) specifies that the Closing Auction occurs at 1 p.m. (Pacific time).

<sup>11</sup> See PCXE Rule 1.1(f).

<sup>12</sup> See PCXE Rule 1.1(g).

<sup>13</sup> See PCXE Rule 1.1(n).

<sup>14</sup> 15 U.S.C. 78f(b).

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

<sup>16</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>17</sup> 17 CFR 240.19b-4(f)(6).

<sup>18</sup> Rule 19b-4(f)(6)(iii) under the Act also requires that a self-regulatory organization provide the Commission with written notice of its intent to file a proposed rule change, along with a brief description and text of the proposed rule change, at least five days prior to the date of filing the proposed rule change. The Exchange complied with this requirement.

PCX's proposal does not raise any new regulatory issues because the Commission previously has approved trading of the same ETFs until 4:15 p.m. (eastern time) on the Amex.<sup>19</sup> Therefore, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission hereby waives the 30-day operative delay.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further the purposes of the Act.<sup>20</sup>

#### 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. Comments may be submitted by any of the following methods:

##### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-PCX-2004-98 on the subject line.

##### Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File No. SR-PCX-2004-98. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the PCX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-PCX-2004-98 and should be submitted on or before December 6, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>21</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50645; File No. SR-PCX-2004-59]

#### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the Pacific Exchange, Inc. Relating to a New Order Modifier Entitled "Proactive if Locked Reserve"

November 5, 2004.

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 July 1, 2004, the Pacific Exchange, Inc. ("PCX" or "Exchange"), through its wholly-owned subsidiary PCX Equities, Inc. ("PCXE"), 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 PCX. On October 26, 2004, the PCX submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> On October 28, 2004, the PCX

submitted Amendment No. 2 to the proposed rule change.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The PCX proposes to amend its rules governing the Archipelago Exchange ("ArcaEx"), the equities trading facility of PCXE, by adding new processing capability for ArcaEx Reserve Orders in situations where a Reserve Order in an exchange-listed security is locked by another market. Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in [brackets].

\* \* \* \* \*

##### Rule 7

##### Equities Trading

##### Orders and Modifiers

\* \* \* \* \*

##### Rule 7.31 Orders and Modifiers

\* \* \* \* \*

*(hh) Proactive if Locked Reserve. A Reserve Order that will route to another market center pursuant to PCXE Rule 7.37(d) for the away market's displayed size up to such reserve amount in the instance in which the other market center has locked the order and the locking market has not resolved the locked market situation in a timely manner based upon average response times from ITS Participants. In the event that the order routed from the Archipelago Exchange to the other market center is not executed in its entirety, the Archipelago Exchange shall post the order or portion thereof in the ArcaEx Book. Proactive if Locked Reserve will apply only to exchange-listed securities.*

\* \* \* \* \*

#### 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, as amended, and discussed any comments it received

and superceded the originally filed proposed rule change.

<sup>4</sup> See letter from Steven B. Matlin, Senior Counsel, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division, Commission, dated October 25, 2004 ("Amendment No. 2"). Amendment No. 2 made technical corrections to the proposed rule text of the proposed rule change, as amended.

<sup>19</sup> Securities Act Release No. 30394 (February 21, 1992), 57 FR 7409 (March 2, 1992) (SR-Amex-90-06) (approving the trading of Unit Investment Trusts); Securities Act Release No. 36947 (March 8, 1996), 61 FR 10606 (March 14, 1996) (SR-Amex-95-43) (approving the trading of Index Fund Shares); Securities Act Release No. 31591 (December 11, 1992), 57 FR 60253 (December 18, 1992) (SR-Amex-92-18) (approving the trading of PDRs).

<sup>20</sup> See *supra* note 6.

<sup>21</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 Steven B. Matlin, Senior Counsel, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated October 25, 2004 and accompanying Form 19b-4 ("Amendment No. 1"). Amendment No. 1 replaced