type of listed security. The proposed rule change was published for comment in the **Federal Register** on September 23, 2005.[3] The Commission received no comments regarding the proposal. This order approves the proposed rule change.

The filing proposes to amend and to reorganize the current listing fees chapter set forth in section 902.00 through section 902.04 of the Manual. Among other things, the Exchange proposes to decrease the current total issuer per annum fee cap by 50% from $1 million to $500,000, with certain exceptions. In addition, the Exchange proposes reducing the Listing Fee schedule to three tiers instead of the current four-tier structure. The Exchange also proposes to set forth Listing Fees for all types of securities as per share numbers instead of the current per million share approach and specify the fees applicable to tracking stocks. The Exchange further proposes to decrease the Listing Fee cap for shares issued in conjunction with stock splits by 40% to $150,000 per stock split and eliminate the three year cap on stock splits as well as apply the $150,000 fee cap to stock dividends.

The Exchange also proposes increasing the current minimum application fee in certain situations; increasing the current minimum application fee for the authorization of a subsequent application to list additional securities or another class of equity securities, or to make changes (such as a change in the name or par value) applicable to issuers that list equity securities; increasing the special charge that is applied when a company first lists a class of common stock; and eliminating the current application fee applicable to processing minor amendments to previously filed applications. With respect to annual listing fees, the Exchange proposes increasing the current minimum annual fee payable on a common stock or a preferred-only listing from $35,000 to $38,000; clarifying that the annual fee for each class of equity security listed is equal to the greater of the minimum fee or the fee calculated on a per share basis of $0.00093; and clearly setting out the minimum and per share rates applicable to each type of listed security. Finally, the Exchange is proposing to make a number of changes and clarifications to its current billing policies.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[4] In particular, the Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act,[5] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and 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 believes that the reorganization of the current fee chapter set out in sections 902.01 to 902.04 of the Listed Company Manual will make those sections clearer, more concise, and easier to use. Guidelines on how fees are calculated as well as numerical examples in each section provide appropriate clarification, where necessary. Further, the Commission believes that the modifications to the Listing Fee schedule simplifies the fee structure for its members. While certain companies may pay higher listing fees than under the current fee schedule, the fee schedule overall is consistent with the Exchange's recent revisions to their fees generally.[6]

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[7] that the proposed rule change (SR–NYSE–2005–35) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–6092 Filed 11–2–05; 8:45 am]

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[3] *See* Securities Exchange Act Release No. 52463 (September 16, 2005), 70 FR 55933.

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

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

[6] *See, e.g.* Securities Exchange Act Release No. 49414 (March 12, 2004), 69 FR 13078 (March 19, 2004).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52685; File No. SR–NYSE–2005–17]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto To Amend NYSE Rule 472 (''Communications With the Public'')

October 26, 2005.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Exchange Act''),[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on February 15, 2005, the New York Stock Exchange, Inc. (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On August 12, 2005, the NYSE submitted Amendment No. 1 to the proposed rule change.[4] On October 19, 2005, the NYSE submitted Amendment No. 2 to the proposed rule change.[5] 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 Exchange is filing with the Commission a proposed amendment to NYSE Rule 472, which will exempt certain communications with the public from the pre-use review and approval requirement. Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in [brackets].

Rule 472

Communications With the Public

Approval of Communications and Research Reports

(a)(1) *Except for institutional sales material*, [E]*e*ach advertisement[,] *and* market letter, *and all* sales literature or other similar type of communication which is generally distributed or made available by a member or member organization to customers or the public must be approved in advance by a member, allied member, supervisory

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

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Amendment No. 1 clarifies the proposal and includes additional information on the use of the term ''Qualified Investor.''

[5] Amendment No. 2 to the proposed rule change makes a technical amendment to the filing.

analyst, or qualified person designated under the provisions of Rule 342(b)(1). *All communications with the public are subject to the standards set forth under Rule 342.17.*

(2)(A) Written policies and procedures relating to institutional sales material are required. Such policies and procedures must include a risk-based system to conduct ''spot-check'' reviews of institutional sales material, prior to distribution or within a reasonable period of time thereafter, for compliance with Rule 472. Factors to be considered in conducting such risk-based reviews must include, at minimum, i) the source of the material (i.e., the department from which the material originates); ii) the functions and responsibilities of persons producing the material; iii) the quantity of material produced per person; iv) the disciplinary history of persons producing the material; v) the content of the material; and vi) the formatting of the material.

(B) The materials selected must be reviewed to determine, at minimum: i) Whether they qualify as institutional sales material pursuant to Rule 472 Supplementary Material .10(6); ii) whether the material gives rise to any conflicts of interest; and iii) whether the material complies with the content standards of Rule 472(i).

[(2)] (*3*) Research reports must be prepared or approved, in advance, by a supervisory analyst acceptable to the Exchange under the provisions of Rule 344. Where a supervisory analyst does not have technical expertise in a particular product area, the basic analysis contained in such report may be co-approved by a product specialist designated by the organization. In the event that the member organization has no principal or employee qualified with the Exchange to approve such material, it must be approved by a qualified supervisory analyst in another member organization by arrangement between the two member organizations.

(b)(1) through (k)(3) UNCHANGED

Supplementary Material: * * *

.10 Definitions

(1) Communication—The term ''Communication'' is deemed to include, but is not limited to advertisements, market letters, research reports, sales literature, electronic communications, communications in and with the press and wires and memoranda to branch offices or correspondent firms which are shown or distributed to customers or the public.

(2) Research Report—''Research report'' is generally defined as a written or electronic communication which includes an analysis of equity securities of individual companies or industries, and provides information reasonably sufficient upon which to base an investment decision.

For purposes of approval by a supervisory analyst pursuant to Rule 472(a)[(2)]*(3)*, the term research report includes but is not limited to, a report which recommends equity securities, derivatives of such securities, including options, debt and other types of fixed income securities, single stock futures products, and other investment vehicles subject to market risk.

(3) Advertisement—''Advertisement'' is defined to include, but is not limited to, any sales communications that is published, or designed for use in any print, electronic or other public media such as newspapers, periodicals, magazines, radio, television, telephone recordings, web sites, motion pictures, audio or video device, telecommunications device, billboards or signs.

(4) Market Letters—''Market Letters'' are defined as, but are not limited to, any written comments on market conditions, individual securities, or other investment vehicles that are not defined as research reports. They also may include ''follow-ups'' to research reports and articles prepared by members or member organizations which appear in newspapers and periodicals.

(5) Sales literature—''Sales literature'' is defined as, but is not limited to, written or electronic communications including, but not limited to, telemarketing scripts, performance reports or summaries, form letters, seminar texts, and press releases discussing or promoting the products, services, and facilities offered by a member or member organization, the role of investment in an individual's overall financial plan, or other material calling attention to any other communication.

(6) Institutional Sales Material—For purposes of Rule 472, the term ''institutional sales material'' includes any communication, other than ''research reports'' and ''advertisements'' as those terms are defined in Supplementary Material section .10 (2) and .10(3) respectively, that is distributed or made available only to ''Qualified Investors'' as defined in section 3(a)(54) of the Securities Exchange Act of 1934, as amended. A member or member organization may not treat a communication as having been distributed or made available only to Qualified Investors if such member or member organization has reason to believe that the communication, or any excerpt thereof, will be forwarded or made available to any person other than a Qualified Investor.

.20 through .120 UNCHANGED

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 is proposing an amendment to NYSE Rule 472, which will exempt certain communications with the public provided to institutional investors from the pre-use review and approval requirement.

Exchange Rule 472 (''Communications with the Public'') prescribes supervisory standards for several types of communications. It currently requires that all market letters, advertisements, sales literature and similar communications be approved in advance by a member, allied member, supervisory analyst, or qualified person designated under the provisions of NYSE Rule 342(b)(1). Communications deemed to be research reports must be prepared or approved, in advance, by a supervisory analyst acceptable to the Exchange under the provisions of NYSE Rule 344 (''Research Analysts and Supervisory Analysts'') (see NYSE Rule 472.10 for definitions of types of communications).

The proposed amendment would exempt communications, except advertising and research reports, from prior-approval requirements if they are directed only to ''Qualified Investors,'' as that term is defined under Section 3(a)(54)[6] of the Exchange Act. The exempted communications are defined as ''institutional sales material.''

According to the NYSE, the Qualified Investor standard was chosen because it is an established definition, readily recognized in the securities industry, that encompasses what are generally

[6] 15 U.S.C. 78c(a)(54).

understood to be ''sophisticated'' investors.[7] Although it includes certain individuals (natural persons), they are subject to a higher financial standard (any natural person who owns and invests on a discretionary basis, not less than $25,000,000 in investments) than an ''Accredited Investor'' (natural persons with net worth of $1,000,000 or $200,000 annual income) defined under Rules 215(e) and (f)[8] of the Securities Act of 1933 (the ''Securities Act'')[9] or a ''Qualified Purchaser'' (natural person who owns not less than $5,000,000 in investments) under Section 2(a)(51) the Investment Company Act of 1940.[10]

According to the NYSE, the rationale for the proposed amendment is based on the fact that the types of communications to be exempted from pre-use review (primarily trader commentary, market ''color'' comments, and other spontaneous market-related communications) are provided as an ongoing, time-sensitive service to sophisticated investors. The NYSE believes that these types of communications are generally understood by such investors to be of-the-moment commentary, not to be confused with formalized, detailed, and prescriptive materials that would rise to the level of research. The NYSE notes that the following types of communications are illustrative of exempted communications (neither advertising nor research) addressed by the proposed amendment:[11]

- Summaries of, or commentary on economic, political or market conditions that do not recommend or rate individual securities.
- Notices of ratings or price target changes that do not contain any narrative discussion or analysis of the company, provided that the member or member organization simultaneously directs the readers of the notice as to where they may obtain the most recent research report on the subject company (such report would be subject to pre-distribution approval and would include disclosures required by NYSE Rule 472, including ''conflicts of interest'' disclosures).
- Information conveyed by trading desk representatives who evaluate and analyze trading conditions for the market as a whole or for particular market sectors. Such communications may include risk arbitrage opportunities such as the near-simultaneous buying and selling of the same or similar securities in different markets to profit on market price differentials.

According to the NYSE, generally speaking, in order for the foregoing information to be effective it must be conveyed in a timely manner. Accordingly, virtually all such information is transmitted electronically. The NYSE believes that requiring item-by-item pre-use review undercuts the value that timeliness imparts to such communications. Further, the NYSE notes that given that the exempted materials do not provide information reasonably sufficient upon which to base an investment decision (in which case, they would be deemed research) a prior-approval requirement is unwarranted in light of the sophistication and financial wherewithal of the recipients.

According to the NYSE, it is also noted that, unlike research analysts, the preparers (*e.g.*, trading desk personnel) of these types of communications are not generally subject to the same risk of pressure from investment bankers that could bias or compromise the integrity of the material. Accordingly, the NYSE notes that research reports, which require disclosure of such potential conflicts of interest, remain subject to pre-use review and approval by a supervisory analyst, and include all potential conflict of interest disclosures required by NYSE Rule 472.

According to the NYSE, the proposed amendment recognizes an essential distinction, reflected in federal securities laws, between protections afforded retail investors and certain designated institutional/sophisticated investors. In this regard, the NYSE believes that many of the disclosure/review requirements in connection with the registration, sale, and/or re-sale of securities to the public, are not statutorily required when such offerings do not involve a public offering (*e.g.*, private placements made in accordance with Regulation D[12] under the Securities Act) or are limited to institutional investors (*e.g.*, re-sales made in accordance with Rules 144[13] and 144A[14] under the Securities Act). NYSE believes that the proposed amendment also recognizes a similar distinction found in the rules of other self-regulatory organizations.[15]

According to the NYSE, as a safeguard, the proposed amendment makes clear that ''institutional sales materials'' (*i.e.*, those sales materials other than advertisements and research) remain fully subject to supervisory requirements prescribed by NYSE Rule 342.17 which include: Appropriate written policies and procedures; provision for the education and training of employees with respect to such policies and procedures; documentation of such education and training; and surveillance and follow-up to ensure that such policies and procedures are implemented and adhered to.

Also, notwithstanding the proposed exemptions, the NYSE believes that all communications remain subject to the general standards for all communications under NYSE Rule 472(i) which prohibit: Any untrue statement or omission of a material fact; a statement that is false or misleading; promises of specific results; exaggerated or unwarranted claims; opinions for which there is no reasonable basis; and projections or forecasts of future events which are not clearly labeled as forecasts.

The proposed amendment further requires written policies and procedures relating to institutional sales material that include a risk-based system to conduct ''spot-check'' reviews of such material, prior to distribution or within a reasonable period of time thereafter,

[7] Exchange Act Section 3(a)(54) expressly defines the term ''qualified investor,'' and provides authority to the Commission by rule or order to expand the definition to include any other person, taking into consideration such factors as the person's financial sophistication, net worth, and knowledge and experience in financial matters. Subsection (xi) of Section 3(a)(54)(A) provides that ''any corporation, company, or partnership that owns and invests on a discretionary basis, not less than $25,000,000 in investments'' is a qualified investor. The Commission interpreted the term ''company'' as used in this subsection to have a broad meaning that encompasses any other type of entity not otherwise specifically listed in Section 3(a)(54). In addition, subsection (v) of Section 3(a)(54)(A) includes certain employee benefit plans within the definition of ''qualified investor.'' The Commission clarified that any State sponsored employee benefit plan, or any other employee benefit plan, within the meaning of the Employee Retirement Income Security Act of 1974, other than an individual retirement account, qualifies only if the investment decisions are made by a plan fiduciary, as defined in Section 3(21) of that Act, which is either a bank, savings and loan association, insurance company, or registered investment adviser. Section 3(a)(54) expressly limited the definition of ''qualified investor'' to these types of employee benefit plans, and the Commission's interpretation does not cover other types of employee benefit plans. See Release No. 47364 (February 13, 2003), 68 FR 8686 (Feb. 24, 2003).

[8] 17 CFR 230.215(e) and (f).

[9] 15 U.S.C. 77a.

[10] 15 U.S.C. 80a–2(a)(51).

[11] *See* Joint Memorandum of NASD and the New York Stock Exchange (NYSE Information Memo Nos. 02–26, dated June 26, 2002 and 04–10, dated March 9, 2004).

[12] 17 CFR 230.501–508.

[13] 17 CFR 230.144.

[14] 17 CFR 230.144A.

[15] The Securities and Exchange Commission approved amendments to NASD Rule 2210 and approved new Rule 2211 which, inter alia, exclude all communications to institutional investors from NASD member pre-use approval, from NASD filing requirements, and from many of NASD's content standards. *See* Release No. 34–47820 (May 9, 2003), 68 FR 27116 (May 19, 2003) (SR–NASD–00–12).

for compliance with NYSE Rule 472. According to the NYSE, factors to be considered in conducting a risk-based review of institutional sales material must include, at minimum:

(1) The source of the material (*i.e.*, the department from which the material originates to identify possible inter-departmental conflicts of interest); [16]

(2) The functions and responsibilities of persons producing the material (to identify persons with access to sensitive information);

(3) The quantity of material produced per person (to concentrate on those persons issuing the most material);

(4) The disciplinary history of persons producing the material (a disciplinary history might warrant pre-use review, or other regulatory action in some instances);

(5) The content and formatting of the material, to determine whether it qualifies for post-distribution review as institutional sales material under NYSE Rule 472 Supplementary Material .10(6) (*i.e.*, to determine that it is not research or advertising), and to review for conflicts of interest (*e.g.*, recommendations of securities in which the author or the firm holds a proprietary position); and

(6) Whether the material complies with the content standards of NYSE Rule 472(i).

In sum, the Exchange believes the proposed amendment would expedite the transmission of time-sensitive market materials to sophisticated customers, while retaining appropriate supervisory controls, follow-up, and review.

It is also proposed that paragraph 472(a)(2) be repositioned and renumbered 472(a)(3) and that the reference to this paragraph in 472.10(2) be likewise amended to reflect the change. The NYSE believes that these are non-substantive amendments.

(2) Statutory Basis

The statutory basis for this proposed rule change is Section 6(b)(5) of the Exchange Act [17] which requires, among other things, that the rules of the Exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and in general to protect investors and the public interests. The proposed rule is consistent with this section in that it would expedite transmission of time sensitive communication to sophisticated investors while retaining appropriate controls, follow-up, and review of such materials and persons.

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 not necessary or appropriate in furtherance of the purposes of the Exchange Act.

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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 Exchange consents, the Commission:

(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, 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 e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2005–17 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–NYSE–2005–17. 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. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. 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–NYSE–2005–17 and should be submitted on or before November 25, 2005.

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

Jonathan G. Katz,

Secretary.

[FR Doc. E5–6094 Filed 11–2–05; 8:45 am]

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[16] *See* NYSE Information Memo No. 91–22, dated June 28, 1991 for joint NYSE/NASD guidance on ''Chinese Wall'' policies and procedures with respect to material, non-public information.

[17] 15 U.S.C. 78f(b)(5).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52672; File No. SR–PCX–2005–121]

Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Add to Its Current Revenue Sharing Program an Opportunity To Share in ETP Operating Revenue for Cross Orders in Tape C Securities

October 25, 2005.

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 October 21, 2005, 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 and II below, which Items have been prepared

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

[2] 17 CFR 240.19b–4.