

for comment in the **Federal Register** on May 9, 2003.<sup>3</sup> No comments were received on the proposed rule change.

Current PCX Rule 6.82 requires the Options Allocations Committee (“OAC”) to allocate option issues to LMMs based on an overall evaluation of such factors as a candidate’s adequacy of capital, operational capacity, support personnel, trading crowd evaluations and history of adherence to Exchange rules and securities laws. However, absent extraordinary circumstances, no LMM may be allocated more than 15% of the number of issues traded on the options floor.

The Exchange now proposes to eliminate this fixed concentration limit. Instead, PCX would add the number and quality of issues already allocated to an LMM to the list of factors considered by the OAC. Additionally, PCX would adopt a guideline requiring the OAC to consider the concentration of an LMM’s issues if an event or proposal would cause the LMM to meet either of the following criteria: (i) The number of issues allocated to it (and any affiliated LMM) is 25% or more of the total number of issues traded on the PCX; or (ii) the volume in the issues allocated to it (and any affiliated LMM) is 50% or more of the total volume of the PCX or 25% or more of the total volume in equity option issues of the PCX. If an LMM met either of these criteria, the guideline would require the OAC to evaluate whether the event or proposal would result in an unacceptable level of concentration. If so, the OAC could exercise its discretion and take action to lower the resulting level of concentration or to deny the subject proposal. The OAC would also retain the discretion to review an LMM’s level of concentration at any time, regardless of whether the above criteria are met.

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.<sup>4</sup> Specifically, the Commission finds that the proposal is consistent with section 6(b)(5) of the Act,<sup>5</sup> which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect

the mechanism of a free and open market, and to protect investors and the public interest.

The Commission has previously noted that PCX’s concentration limits serve the purpose of minimizing the disturbance to a fair and orderly market that might otherwise result from the failure of an LMM.<sup>6</sup> However, as the Commission has also noted, other exchanges do not impose specified mandatory limits on the number of options that may be allocated to specialists.<sup>7</sup> The Commission believes that the approach proposed by PCX is similar to one employed by the Chicago Board Options Exchange (“CBOE”). Like the proposed PCX Rule and Guidelines, CBOE Rule 8.84 and Regulatory Guideline 99–135 do not impose a mandatory cap on the number of issues that may be allocated to a Designated Primary Market-Maker (“DPM”). Instead, the CBOE guideline provides that a review with the relevant committee may be triggered when, *inter alia*, the number of classes allocated to a DPM is 25% or more of the total number of classes traded on CBOE. The Commission believes that it is permissible for the PCX to adopt a similar approach. The Commission further believes that the proposed rule changes should provide PCX with an appropriate degree of regulatory flexibility, and allow it to compete more effectively with other exchanges. At the same time, the proposal should preserve the Exchange’s ability to minimize the risks associated with potential LMM failures.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>8</sup> that the proposed rule change (File No. SR–PCX–2002–25) be, and it hereby is, approved.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48028; File No. SR–PCX–2003–26]

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

June 13, 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 May 30, 2003, the Pacific Exchange, Inc. (“PCX”) filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III 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 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 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 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

###### 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.<sup>3</sup> The PCX segregates the funds from this fee by trading post and makes

<sup>3</sup> See Securities Exchange Act Release No. 47795 (May 5, 2003), 68 FR 25074.

<sup>4</sup> In approving this proposal, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78(c)(f).

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

<sup>6</sup> See Securities Exchange Act Release No. 42583 (March 28, 2000), 65 FR 17689 (April 4, 2000).

<sup>7</sup> *Id.* at 17690; Chicago Board Options Exchange Rule 8.84, Regulatory Guideline 99–135; American Stock Exchange Rule 26, Interp. 03.

<sup>8</sup> 15 U.S.C. 78s(b)(2).

<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 Securities Act Release No. 44830 (September 21, 2001), 66 FR 49728 (September 28, 2001) (PCX–2001–37).

the funds available to LMMs for their use in attracting orders in the options traded at the posts. The PCX charges the marketing fees as set forth in the Schedule of Rates. The PCX's marketing fee program applies only to option issues classified by the PCX as the Top 250 issues. 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.

The PCX is proposing to change the marketing fee for certain options as set forth in the Schedule of Rates beginning at the commencement of the June 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 Rates. Any fees currently being charged for transactions in options that are not listed in this amendment to the Schedule of Rates 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. Only the amount of the fee is being changed.

#### Basis

The PCX believes that the proposal is consistent with section 6(b) of the Act<sup>4</sup> and section 6(b)(4) of the Act<sup>5</sup> in particular in that it provides for the equitable allocation of reasonable fees among its 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.

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

The PCX 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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>6</sup> and Rule 19b-4(f)(2) thereunder<sup>7</sup> because it changes the PCX fee schedule. At any time within 60 days after the filing of this 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., 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 PCX. All submissions should refer to File No. SR-PCX-2003-26 and should be submitted by July 14, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48031; File No. SR-PCX-2003-25]

#### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Relating to Exchange Fees and Charges

June 13, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on May 30, 2003, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "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 PCX is proposing to amend its Schedule of Fees and Charges by modifying its Order Cancellation Fees. The text of the proposed rule change is set forth below. Proposed new language is in *italics*; proposed deletions are in [brackets].

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#### Schedule of Fees and Charges for Exchange Services

##### PCX OPTIONS: TRADE-RELATED CHARGES

Transactions: No change.

Order Cancellation: \$1.00 per MFI order canceled.

*Except as provided herein, the fee [O]only applies to orders canceled through the MFI in any month where the total number of orders canceled through the MFI by the executing Clearing Member exceeds the total number of orders that same firm executed through the MFI in that same month. This fee does not apply to executing Clearing Members canceling less than 500 orders through the MFI in a month. The MFI fee will also not apply to cancel requests on invalid orders (the option has already expired and the Exchange has purged it from its system); invalid symbols (a symbol that does not refer to a valid option traded on the Exchange); or invalid series (a series that is not recognized by or traded on the Exchange).*

<sup>6</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>7</sup> 17 CFR 240.19b-4(f)(2).

<sup>8</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>4</sup> 15 U.S.C. 78f(b).

<sup>5</sup> 15 U.S.C. 78f(b)(4).