

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 NYSE. All submissions should refer to file number SR-NYSE-2002-02 and should be submitted by February 6, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁶

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45263; File No. SR-NYSE-2001-53]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. Amending Its Rules Regarding the Transmission of Proxy and Other Shareholder Communication Material and the Proxy Reimbursement Guidelines Set Forth in Those Rules, and Requesting Permanent Approval of the Amended Proxy Reimbursement Guidelines

January 9, 2002.

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 December 21, 2001, the New York Stock Exchange, Inc. ("NYSE" 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. On January 9, 2002, the NYSE filed Amendment No. 1 to the proposed rule change.³ 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

Subject to the guideline amendments noted below, the Exchange seeks

permanent approval of the pilot program setting forth guidelines for the amounts that NYSE issuers should reimburse member organizations for the distribution of proxy materials and other issuer communications to security holders whose securities are held in street name. In addition, the Exchange proposes to amend the guidelines under the current pilot program by decreasing the basic mailing fee paid by "Large Issuers" (as defined below) by 5¢ (from 50¢ to 45¢) and by cutting in half the incentive fee payable by Large Issuers (from 50¢ to 25¢).

The text of the proposed rule change, as amended, is available upon request from the Office of the Secretary, the NYSE or 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 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

Exchange Rule 451 ("Transmission of Proxy Material") and Exchange Rule 465 ("Transmission of Interim Reports and Other Material") (collectively, the "Rules") currently provide for a pilot program pursuant to which the NYSE has established fee reimbursement guidelines (the "Pilot Program"). Under the Pilot Program, the NYSE has established guidelines for the amounts that NYSE issuers should reimburse member organizations for the distribution of proxy materials and other issuer communications to security holders whose securities are held in street name (the "Guidelines"). In this proposed rule change, as amended, the Exchange seeks permanent approval of the Pilot Program Guidelines. In addition, the Exchange proposes to amend certain reimbursement fees that the Guidelines establish. Those amendments seek to decrease the basic mailing fees paid by large issuers by 5¢ (from 50¢ to 45¢) and to cut in half (from 50¢ to 25¢) the incentive

"suppression" fee that large issuers pay to member organizations that succeed in reducing the number of sets of materials that need to be distributed (such as by sending one set of materials to a household holding multiple positions in the issuer's securities).

A. Permanent Approval

Supplementary Material .90 ("Schedule of approved charges by member organizations in connection with proxy solicitations") to Exchange Rule 451 applies the Guidelines to the transmission of proxy materials to shareholders. Supplementary material .20 ("Mailing charges by member organizations") to Exchange Rule 465 applies them to the transmission of other materials to shareholders. In addition, Paragraph 402.10(A) of the NYSE's *Listed Company Manual* ("Charges for Initial Proxy and/or Annual Report Mailings") includes the text of Supplementary Material .90 to Exchange Rule 451 and the Exchange proposes to conform Paragraph 402.10(A) to conform to the changes described below to Exchange Rule 451. The Commission initially approved the Pilot Program on March 14, 1997.⁴ Pursuant to Commission extensions of its initial approval, the Pilot Program has remained in effect since then. Pursuant to the Commission's most recent extension, the Pilot Program is currently scheduled to expire on April 1, 2002.⁵

During this period, the NYSE has participated on the Proxy Voting Review Committee (the "Committee"). The Committee is a private initiative that is designed to review the proxy process. It includes self-regulatory organizations and representatives of the securities industry, corporate issuers and institutional investors, as well as the largest provider of proxy intermediary services. The Committee has monitored the effects of the Guidelines on the market and has maintained an on-going dialogue among Committee representatives. In addition, the Exchange has had an independent accounting firm audit the Pilot Program.⁶

The Committee's experience with the Pilot Program has convinced it that the Guidelines have been instrumental in setting at fair and reasonable levels the costs that issuers incur in having member organizations and

⁴ See Securities Exchange Act Release No. 38406 (March 14, 1997), 62 FR 13922 (March 24, 1997) (File No. SR-NYSE-96-36).

⁵ See Securities Exchange Act Release No. 44750 (August 29, 2001), 66 FR 46488 (September 5, 2001) (File No. SR-NYSE-2001-22).

⁶ See Amendment No. 1, *supra* note 3.

⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Darla C. Stuckey, Corporate, NYSE, to Sharon Lawson, Senior Special Counsel, Division of Market Regulation, Commission, dated January 7, 2002 ("Amendment No. 1"). In Amendment No. 1, the Exchange made some technical and clarifying corrections to the proposed rule change.

intermediaries transmit proxy and other materials to security holders. For that reason, the Committee unanimously voted (with one abstention) to recommend that the NYSE seek permanent approval of the Guidelines, as modified by this proposed rule change, as amended, and the Exchange has determined that it is appropriate to do so.

B. Guideline Changes

In addition to seeking permanent approval of the Guidelines, the Committee has recommended certain amendments to the Guidelines. The Exchange supports those amendments, proposes to adopt them into its Rules and supports the Committee's rationale for the amendments, as set forth below. The proposed amendments are as follows:

(i) Reduce the suggested rate of reimbursement for initial mailings of each set of material (*i.e.*, proxy statement, form of proxy and annual report when mailed as a unit) from 50¢ to 40¢.

(ii) Increase the suggested per-nominee fee for intermediaries that coordinate the proxy and mailing activities of multiple nominees. That suggested fee is currently \$20 per nominee. The increase would raise it (A) 10¢ per set of material required for "Small Issuers" (defined as issuers whose shares are held in fewer than 200,000 nominee accounts), or (B) 5¢ per set of material required for "Large Issuers" (defined as issuers whose shares are held in at least 200,000 nominee accounts).

(iii) Reduce from 50¢ to 25¢ the incentive fee for initial mailings of the materials of Large Issuers (again, issuers whose shares are held in at least 200,000 nominee accounts). As a result, the incentive fee for Large Issuers will decrease by 25¢ and the incentive fee for Small Issuers will remain at 50¢.

The Committee and the Exchange represent that the net effect of clauses (i) and (ii) is to decrease the effective mailing fee by 5¢ for Large Issuers, but not for Small Issuers. One intermediary projects that the combination of that decrease and the decrease in the incentive fee for Large Issuers will decrease the total fees that issuers pay to have materials distributed to shareholders by almost \$11 million.⁷

The Guidelines currently subject Small Issuers and Large Issuers to the

same rates. The Committee has designed the proposed revamped fee schedule to allocate more fairly the costs of distributing proxy and other material between Large Issuers and Small Issuers. The Committee recognizes that economies of scale create overall per-account cost savings for Large Issuers and that those savings justify lower fees for Large Issuers. The Committee determined that reducing the rates applicable to Large Issuers relative to the rates applicable to Small Issuers is fair, reasonable and appropriate.⁸

The Committee recognizes that a member organization typically spends less in transmitting material to the nominee account of a Large Issuer than in transmitting material to the nominee account of a Small Issuer. That is because economies of scale apply to many of the tasks of processing material for distribution and of collecting voting instructions. For instance, processing search dates and record dates, logging receipt of materials, coding proxies, reporting voting results and invoicing fees payable involve costs that are essentially fixed. As a result, the per-account cost for these tasks decreases in relation to the number of accounts in which the issuer's shares are held. That per-account cost is therefore lower with respect to a Large Issuer than with respect to a Small Issuer.

In addition, modern data processing and mailing techniques reduce the amount of human intervention involved in the process, driving down the actual per-account cost of handling mailings in large volume. The Committee believes that the actual cost incurred with respect to Large Issuers in handling mailings is lower than the reimbursable amount that results from adherence to the current Guidelines. On the other hand, the actual cost of handling mailings for Small Issuers far exceeds the fees set forth in the current guidelines.⁹ The Committee believes that these factors justify reducing the incentive fee from 50¢ to 25¢ for Large Issuers, but not reducing the 50¢ fee for

⁸ The Committee voiced its support for the proposed fee changes in the Committee Letter. See Exhibit C to the Exchange's proposed rule change.

⁹ Even taking into consideration increased costs associated with institutional shareholder requirements and peak season processing, both of which are associated more with Large Issuers than Small Issuers, the Committee nonetheless found that handling costs for Large Issuers are lower than for Small Issuers, due primarily to economies of scale.

The largest provider of proxy intermediary services presented information to the Committee that detailed the costs that issuers pay for registered proxy processing. That information indicated that the per-unit costs that Small Issuers pay are, on average, more than 10 times greater than the per-unit costs that Large Issuers pay.

Small Issuers. They also justify the 5¢ difference in the per-set-of-material per-nominee fee for Large Issuers and Small Issuers.

In applying the proposed revamped fee schedules to the Guidelines, the Committee has had to establish a line of demarcation that separates Large Issuers from Small Issuers. It settled on requiring an issuer to have 200,000 nominee accounts in order to qualify as a Large Issuer. As a result, only the largest issuers, fewer than 200 overall, fall within that definition. However, beneficial owners' positions in shares of those Large Issuers account for approximately 50 percent of the number of positions that all beneficial owners maintain in the shares of all issuers. The Exchange has adopted the Committee's recommendations discussed above, including the recommendation that the 50 percent mark is an appropriate place at which to draw the line. The Exchange, in this proposed rule change, as amended, proposes to incorporate the Committee's recommendations into its Guidelines and Rules.

2. Statutory Basis

The Exchange believes the proposed rule change, as amended, is consistent with section 6(b) of the Act,¹⁰ in general, and furthers the objectives of sections 6(b)(4)¹¹ and 6(b)(5)¹² of the Act, in particular. Section 6(b)(4) of the Act¹³ provides that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. Section 6(b)(5) of the Act¹⁴ provides that an exchange have rules 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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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.

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

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

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4).

¹² 15 U.S.C. 78f(b)(5).

¹³ 15 U.S.C. 78f(b)(4).

¹⁴ 15 U.S.C. 78f(b)(5).

⁷ See letter to Richard A. Grasso, Chairman and Chief Executive Officer, NYSE, from Stephen P. Norman, Chairman, Committee, dated November 28, 2001 (the "Committee Letter"). A copy of the Committee Letter is attached as Exhibit C to the Exchange's proposed rule change.

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

The NYSE has engaged in on-going dialogue regarding the proposed rule change and other aspects of the Pilot Program with Commission staff, as well as with the Committee. The proposed fee changes were developed and approved by the Committee. In the Committee Letter, the Committee asserts that the proposed fees appear reasonable in light of the service levels required and the overall costs associated with the elimination of duplicate mailings, that the proposed fees reflect the economies of scale of the Large Issuers and that the Guidelines should be made permanent.

In addition, the NYSE has received other comment letters on the proposed fee changes from the Securities Industry Association ("SIA"), the American Society of Corporate Secretaries ("ASCS") and the Association of Publicly Traded Companies ("APTC").¹⁵ SIA, ASCS and APTC all endorse the proposed fee changes. APTC notes in its letter that the Pilot Program provided a \$235 million reduction in costs in 2001 from mail suppressions and is projected to provide savings of more than twice that amount by 2005. APTC also posits that the large volumes and low incremental cost of transmitting proxy materials for Large Issuers justify their payment of lower rates than Small Issuers.

Several of the Commission releases approving changes to the Pilot Program included language encouraging interested parties to consider approaches that would foster competition in the proxy distribution service industry. The releases also suggested that market forces, rather than regulators, should determine reasonable rates for proxy distribution services.

The Exchange views the Guideline-setting process as an on-going matter. Even if the Commission grants permanent status to the Guidelines, the Exchange intends to continue to meet with the Committee to evaluate and tune the Guidelines and to consider possible approaches to broader reform of the proxy distribution system.

¹⁵ See letter to Richard A. Grasso, Chairman and Chief Executive Officer, NYSE, from Donald D. Kittell, Executive Vice President, SIA, dated November 29, 2001 (the "SIA Letter"); letter to James E. Buck, Senior Vice President and Secretary, NYSE, from Brian T. Borders, President, APTC, dated November 29, 2001 (the "APTC Letter"). Those letters are included in Exhibit D to the Exchange's 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 will:

(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. 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 NYSE. All submissions should refer to File No. SR-NYSE-2001-53 and should be submitted by February 6, 2002.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.¹⁶

Margaret H. McFarland,

Deputy Secretary.

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¹⁶ 17 CFR 200.30-2(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45262; File No. SR-PCX-2001-47]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change, Amendment No. 1, and Amendment No. 2 Thereto by the Pacific Exchange, Inc. Establishing a New Exchange Fee Based on the Number of Order Cancellation Routed Through the Exchange's Member Firm Interface

January 9, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4² thereunder, notice is hereby given that on November 27, 2001, 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. On December 13, 2001, the PCX submitted Amendment No. 1 to the proposed rule change.³ On December 26, 2001, the PCX submitted Amendment No. 2 to the proposed rule change.⁴ 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 establish a new fee based upon the number of order cancellations that are routed through the MFI.

The text of the proposed rule change, as amended, is available at the Office of

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Cindy L. Sink, Senior Attorney, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated December 12, 2001 ("Amendment No. 1"). In Amendment No. 1, the PCX amended note 2 to the PCX Fee Schedule entitled "Options: Trade-Related Charges" to clarify that the fee will be assessed when the total number of orders an executing clearing member cancels through the PCX Member Firm Interface ("MFI") in a particular month exceeds the total number of orders that member executes through the MFI in that same month.

⁴ See letter from Cindy L. Sink, Senior Attorney, PCX, to Nancy J. Sanow, Assistant Director, Division, Commission, dated December 21, 2001 ("Amendment No. 2"). In Amendment No. 2, the PCX clarified the purpose of the proposed rule change. For purposes 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 December 26, 2001, the date the PCX filed Amendment No. 2. See 15 U.S.C. 78s(b)(3)(C).