

individual specialist unit would be permitted to trade the same security as a primary market maker on more than one market.

## (2) Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,<sup>4</sup> in general and furthers the objectives of section 6(b)(5) of the Act,<sup>5</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 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, and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

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

The Exchange believes that the proposed rule change would impose no burden on competition and, in fact, will tend to strengthen and maintain competition. The Exchange further believes that competition among markets (and, as the result, the interests of investors) would be adversely impacted if a firm were permitted to act as the primary market maker in more than one market in the same security. The Exchange believes also that it is virtually impossible for a firm that acts as a primary market maker in the same security in more than one market to compete with itself, and that resource allocation decisions by the firm would tend to strengthen the capabilities of one of the market making operations to the detriment of the other(s). The prospect of the same or related firms posting inconsistent quotes and providing varying executions in different markets also may raise other concerns. As a result, the Exchange believes that it is appropriate and in the interests of promoting competition among markets and protecting the interests of investors to prohibit Amex specialists and their affiliates from acting in a primary market making capacity in the same security on another national securities exchange or facility of a national securities association.

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

No written comments were solicited or received with respect to 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 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 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 filings will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-Amex-2001-55 and should be submitted by August 16, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>6</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-46233; File No. SR-CHX-2002-19]

### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Stock Exchange, Inc. Relating to Membership Dues and Fees**

July 19, 2002.

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 hereby is given that on June 28, 2002, the Chicago Stock Exchange, Inc. ("CHX") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which the CHX 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 CHX proposes to amend its membership dues and fees schedule effective through July 31, 2002, to provide for continued assessment of a marketing fee in instances where transactions in a subject issue meet certain criteria, described below. The text of the proposed rule change is available at the CHX 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 CHX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had received regarding the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CHX 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 proposed change to the CHX fee schedule would provide for continued assessment of a marketing fee, in an amount equal to \$.01 per share,

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

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

<sup>6</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.

applicable to transactions occurring on or before July 31, 2002. The marketing fee would apply only to "Subject Transactions"<sup>3</sup> in "Subject Issues"<sup>4</sup> and would not be assessed if the specialist trading the Subject Issue elected to forego collection of the marketing fee.

The CHX currently assesses a marketing fee under a provision of the CHX fee schedule that is scheduled to expire by its terms on June 30, 2002.<sup>5</sup> Under the system currently in place, the CHX calculates, bills, and collects the marketing fee and gives the proceeds to the specialist firm trading the Subject Issue. The specialist firm then distributes the funds to order-sending firms in accordance with its payment-for-order flow arrangements relating to the Subject Issue (and possibly also to market makers who contribute to market share growth in certain instances).<sup>6</sup> The remaining undistributed funds in excess of \$1000 are refunded, on a quarterly basis, to the paying parties *pro rata*, in proportion to the fees they have paid.

The marketing fee provision proposed herein does not differ from the previous version except that it would extend application of the marketing fee through July 31, 2002. This additional month will give the CHX the opportunity to evaluate further whether the marketing fee should be continued.

The CHX intends that the continued imposition of the marketing fee will allocate equitably the financial burden of seeking order flow for Subject Issues. According to the CHX, in the absence of

the marketing fee the CHX specialist trading a Subject Issue is the sole bearer of the often substantial costs associated with attracting order flow to the CHX, as well as licensing fees that the licensor of the product imposes.<sup>7</sup> CHX market makers participating in transactions in Subject Issues, conversely, do not currently share any of these costs. The proposed rule change would allow a specialist trading a Subject Issue to elect or decline imposition of the marketing fee depending on whether the specialist believes it is appropriate for a part of the financial burden of trading the Subject Issue to be allocated among those trading the Subject Issue. The CHX anticipates that the proposed rule change will continue to provide specialists trading Subject Issues with sufficient incentive to continue their efforts to attract additional order flow and increase market share.

## 2. Statutory Basis

The CHX believes that the proposed rule change is consistent with section 6(b)(4) of the Act<sup>8</sup> in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members.

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

The CHX 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 Regarding the Proposed Rule Change Received From Members, Participants or Others

The CHX received one written comment from a member in advance of the CHX Finance Committee meeting on June 18, 2002. This letter from Steven Shapiro of SJS Securities, Inc., a CHX specialist firm, asserted that the number of CHX market makers trading in exchange-traded funds ("ETFs") has dropped from 15–20 to 3–5 since the imposition of the marketing fee. According to the CHX, Mr. Shapiro further argued that the marketing fee "has no value at this time" and that the CHX needed to focus on initiatives that would help the CHX market maker program "thrive and prosper."

The CHX believes that this analysis mistakenly attributes the decline in CHX market maker activity to the imposition of the marketing fee. In fact,

the CHX believes that this decline is attributable to other factors, including significant competition for ETF order flow from other national market participants and alternative trading systems ("ATSs"). Indeed, as has been highly publicized in recent weeks, one ATS has recently captured nearly a one-third market share in the Nasdaq 100 "QQQ" product, a market share higher than that sustained by the QQQ listing market. Moreover, while the CHX acknowledges that imposition of the marketing fee does increase a market maker's cost of trading Subject Issues on the CHX, the CHX believes that the often significant costs associated with the Subject Issues, including increasingly hefty license fees, amply justify asking the CHX members who trade the Subject Issues to share the costs of attracting the order flow and trading these popular products on the CHX.

The CHX believes that this rationale is also readily applicable in response to a letter that the Commission received from Alvin Boutte, Jr., a CHX member who formerly traded the QQQ as a market maker. Mr. Boutte submitted a comment letter with respect to the CHX's prior submission extending the marketing fee through June 30, 2002. The Commission received Mr. Boutte's comment letter after the expiration of the abrogation period for that filing. The CHX believes that it is necessary and helpful to address Mr. Boutte's comment letter in the context of the CHX's proposed further extension of the marketing fee.

According to the CHX, Mr. Boutte contends that the additional expense borne by market makers that are subject to the marketing fee is an economic burden that cannot be sustained by smaller market participants and that, as a result, it is unfair. The CHX asserts that, contrary to Mr. Boutte's contentions, the marketing fee is not intended to hurt smaller market participants in any way. Rather, as set forth above, the CHX intends that the marketing fee would merely help shift some of the economic burden borne by specialists to other parties also trading exchange-traded fund products.

The CHX believes that Mr. Boutte is mistaken about two other points. First, Mr. Boutte states that the CHX does not have a process in place to ensure that specialist firms distribute the funds to order-sending firms in accordance with their payment for order flow arrangements relating to a particular security. The CHX believes, however, that it has taken steps to ensure that these funds are properly spent. The CHX notes that, in fact, the CHX

<sup>3</sup> "Subject Transaction" means (a) any trade with a customer, whether the contra party is a specialist or a market maker, where the order is delivered to the CHX via the MAX system or where compensation is paid to induce the routing of the order to the CHX; or (b) any trade between a specialist and a market maker in which the market maker is exercising rights under the market maker entitlement rules.

<sup>4</sup> "Subject Issue" means any issue which constitutes an exchange-traded fund and meets the following two criteria: (a) average daily share volume in the issue exceeds 150,000 shares each month during a consecutive two month period; and (b) market maker share participation in the same issue exceeds 5% for each month during the same two-month period.

<sup>5</sup> See Securities Exchange Act Release No. 44646 (August 2, 2001), 66 FR 41641 (August 8, 2001) (announcing immediate effectiveness of the new marketing fee provision to the CHX fee schedule through December 31, 2001; Securities Exchange Act Release No. 45282 (January 15, 2002), 67 FR 3517 (January 24, 2002) (extending program through June 30, 2002).

<sup>6</sup> See Securities Exchange Act Release No. 44646 (August 2, 2001), 66 FR 41641 (August 8, 2001) (SR-CHX-2001-10) (describing potential arrangements between specialists and market makers). According to the CHX, no such arrangements are currently in place. Conversation between Kathleen M. Boege, Associate General Counsel, CHX, and Patrick M. Joyce, Special Counsel, Division of Market Regulation, Commission, on July 18, 2002.

<sup>7</sup> The marketing fee, under the rule change proposed herein, will be assessed only against exchange-traded fund products, which virtually always have an associated licensing fee.

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

requires each specialist firm that receives marketing fees to certify, each month, that it is using the funds in accordance with payment for order flow arrangements in the issues for which the fee was collected. The CHX represents that, if it has reason to believe that a certification has been falsely given, it would review the specialist firm's books and, if the certification were found to be false, initiate appropriate disciplinary action against the firm.

According to the CHX, Mr. Boutte also states that the specialist firms have the right to choose whether a fee is charged or not, giving the impression that the specialist firms have a great deal of power in determining the fee. The CHX asserts that, as described above, it has imposed the \$.01/share marketing fee on all trades that meet the definition of a Subject Transaction in a Subject Issue; a specialist firm may choose to waive the fee in a particular issue altogether, or it may receive the fees that are collected. The CHX notes, however, that a firm cannot choose to have the fee assessed only to certain market makers, nor can it decide to decrease the amount of the fee, whether for some or all market makers in the issue.

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

The foregoing rule change establishes or changes a due, fee, or other CHX charge and therefore has become effective pursuant to section 19(B)(3)(A) of the Act<sup>9</sup> and Rule 19b-4(f)(2) thereunder.<sup>10</sup> At any time within 60 days of the filing of the 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 purpose 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. 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 at the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the principal office of the CHX. All submissions should refer to File No. SR-CHX-2002-19 and should be submitted by August 16, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46239; File No. SR-PCX-2002-38]

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

July 19, 2002.

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 June 28, 2002, 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. 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 proposes to amend its Schedule of Fees and Charges by changing the following fees for options: Regulatory fees (FOCUS filing fee, Registered Representative fee, and Designated Examining Authority ("DEA") fee) and Floor and Market Maker fees (floor brokerage fees, telephone fees, the options surcharge, and the LMM shortfall fee). In addition, the Exchange, through its wholly-owned subsidiary PCX Equities, Inc. ("PCXE"

or "Corporation") proposes to amend its Schedule of Fees and Charges to change its Regulatory fees (Focus filing fee, Registered Representative fee, and DEA fee) applicable to ETP Holders and Sponsored Participants that access the Archipelago Exchange ("ArcaEx") trading facility.

The text of the rule change is available at the Office of the Secretary of 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 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 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

###### 1. Purpose

The Exchange proposes to make the following changes to its Schedule of Fees and Charges.

###### a. Regulatory Fees

###### i. FOCUS Filing Fee

The Exchange proposes to increase rates for Financial and Operational Combined Uniform Single Report ("FOCUS report") filers from \$25 to \$100 per year. Pursuant to Commission rules, all broker-dealers for which the Exchange serves as the DEA are required to file FOCUS reports with the Exchange either monthly, quarterly or annually. The proposed fee increase is designed to offset the internal staff costs associated with processing hard-copy FOCUS report filings, including the cost of re-typing the report and reconciling any differences. The proposed fee applies to both options and equities.

###### ii. Registered Representative Fee

The Exchange currently charges a \$50 annual fee for new applications, maintenance and transfer of registration status for each Registered Representative and each Registered Options Principal whose firm is a Member Firm of the Exchange. The Exchange proposes to increase the fee to \$55 for options and equities. The Exchange believes this fee change is warranted based upon the Exchange's

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 19b-4(f)(2).

<sup>11</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.