

## 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 is proposing to make the following technical changes to its Schedule of Fees and Charges in order to correct the fee schedule and accurately reflect the DEA fees that the Exchange intends to charge with respect to its options and equities businesses. With respect to the options DEA fees, the current fees schedule includes a footnote that provides an exemption of such fees for Member Organizations that demonstrate that at least 25% of their income was derived from on-floor activities. This footnote and the exemption were not, however, intended to apply to the \$250 per quarter fee for firms engaging in non-public business. The Exchange proposes to move the footnote in order to have the fee schedule reflect the Exchange's intent as described herein. With respect to the equities DEA fee, the Exchange included a \$250 per quarter fee for firms engaging in non-public business; however, as this fee is not applicable to the market structure of the Archipelago Exchange, the Exchange erred in including this fee in the schedule. The Exchange proposes to delete this reference.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act,<sup>3</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>4</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members.

### 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

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>5</sup> and subparagraph (f)(2) of Rule 19b-4<sup>6</sup> thereunder. 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 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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to the File No. SR-PCX-2002-73 and should be submitted by February 5, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

Margaret H. McFarland,

Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47143; File No. SR-PCX-2002-20]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. Relating to a Stay of a Committee Action

January 8, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19-4 thereunder,<sup>2</sup> notice is hereby given that on April 9, 2002, 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 PCX. On December 31, 2002, PCX filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change and Amendment No. 1 from interested persons.

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

The PCX proposes to adopt an interim stay provision in connection with its rules regarding review of committee actions.

Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in [brackets].

#### *Request for a Stay of a Committee Action*

Rule 11.7(d). (1) *An aggrieved person seeking review of a committee decision may request a stay of the decision pending a hearing and review by the Board Appeals Committee. The request for a stay must include a \$500 stay fee along with a concise statement of the basis for the stay which must be separate from, and in addition to, a statement of the basis for the review of the complained of action. Applicants*

<sup>7</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> Amendment No. 1 replaced the PCX's original 19b-4 filing in its entirety.

<sup>3</sup> 15 U.S.C. 78f(b).

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

<sup>5</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>6</sup> 17 CFR 240.19b-4(f)(2).

seeking a stay must file the request with the Office of the Corporate Secretary by the earlier of ten (10) business days after the committee renders its decision or forty-eight (48) hours before the committee implements action. The Exchange will not be required to consider a request for a stay made within the 48 hours before a committee implements action.

(2) A stay of a committee action may be granted in only those cases where the aggrieved person has made a showing, based solely on the evidence and information presented in the application for a stay, that: (A) there is a likelihood the applicant will prevail on the merits on review; (B) without a stay, the applicant is likely to suffer irreparable injury; (C) it is likely that there will not be substantial harm to other parties if a stay is granted; and (D) the issuance of a stay is likely to serve the interests of the Exchange or an identified public interest.

(3) The Chair of the Board Appeals Committee will designate a single Board Appeals Committee member to rule on a request for a stay. The designated Board of Appeals Committee member may summarily render a decision on the request for a stay based solely on the documents submitted in support of, and in opposition to, the request for a stay. In evaluating the merits of a stay application, the Committee member will only consider matters relevant to the issuance of the stay, not the underlying complaint. The decision of the Committee member whether to grant a stay may not be appealed under Rule 10.

[Rule 11.7(d)–11.7(n)]Rule 11.7(e)–11.7(o)—No change.

## 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 test 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's Board of Governors delegates certain powers and duties to

committees that administer the provisions of the Constitution and the Rules of the Exchange.<sup>4</sup> The rules of the Exchange provide that persons aggrieved by committee decisions (other than disciplinary matters) may seek review of the decisions subject to the procedural prerequisite of PCX Rule 11.7 (Hearing and Review of Committee Action). PCX represents that, while the rule does not expressly provide a right to interim relief of committee decisions, applicants seeking such relief routinely request that the Exchange stay further action pending review. In the absence of an express policy or procedures relating to interim relief, the Exchange has evaluated the merits of stay applications on a case-by-case relying upon the guidelines that are used by the Commission in reviewing stay applications of self-regulatory organization actions.<sup>5</sup> As a consequence of the Exchange's *ad hoc* review, the Exchange believes that applicants are either not aware that they have a right to interim relief or they are not familiar with the criteria that they must satisfy in seeking a stay.

The Exchange therefore proposes to clearly set forth the criteria and procedures necessary to request a stay of committee action. The proposed new Exchange rule will set forth four factors that the Exchange will consider when evaluating the merits of a stay application: (1) Whether there is a likelihood that the applicant will prevail on the merits of the appeal; (2) that without a stay, the applicant is likely to suffer irreparable injury; (3) that it is likely there will not be substantial harm to other parties if the stay is granted; and (4) that the issuance of a stay is likely to serve in the interests of the Exchange or an identified public interest.<sup>6</sup> The Exchange represents that the applicant must prove each of these factors based solely on the evidence and information presented in the application for a stay.

The proposed new Exchange rule will also clarify the procedures that an applicant must satisfy in seeking a stay. The proposed rule specifies that an applicant must pay a \$500 fee in order to request a stay. The fee will be used to cover a portion of Exchange expenses including the allocation of staff time in processing a request for a stay. The proposal also provides that applicants

must request a stay by the earlier of ten business days after a committee renders its decision or forty-eight hours before the committee implements action. From time to time, the Exchange represents that it may be required to implement a particular committee decision immediately without leaving sufficient time for an aggrieved party to request a stay of action. According to the Exchange, this situation occurs, for example, when the Exchange must identify a particular Lead Market Maker to trade a new option on the following business day, or when the Options Floor Trading Committee makes *ad hoc* trading decisions on the trading floor regarding Auto-Ex decisions pursuant to PCX Rule 6.87. In those unique situations, the Exchange notes that the aggrieved party will not have an opportunity to stay the action, but will be able to appeal the committee decision pursuant to PCX Rule 11.7. The Exchange also represents that it will not be required to consider a request for a stay made within the forty-eight hours before a committee implements action.

The proposed new Exchange rule will also provide that the Exchange's Board Appeals Committee may render a decision summarily based solely on the documents submitted in support of, and opposition to, the request for stay. In the event that the Board Appeals Committee denies the request for a stay, the Board Appeals Committee will state the reasons for its denial and state facts that support its decision.<sup>7</sup> The Exchange believes that these procedures will guide applicants through the stay process and will provide the Exchange's Board Appeals Committee with a uniform standard by which to judge the merits of an application for interim relief. The proposed new Exchange rule will not apply to disciplinary matters and will not affect an aggrieved person's underlying right to appeal a committee decision.

#### 2. Statutory Basis

The Exchange believes that this proposal, as amended, is consistent with Section 6(b)<sup>8</sup> of the Act, in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>9</sup> in particular, in that it is designed to facilitate transactions in securities, to promote just and equitable principles of trade, to enhance

<sup>4</sup> See PCX Rule 11.4.

<sup>5</sup> See 17 CFR 201.401(d); see also Order Preliminarily Considering Whether to Issue Stay *Sua Sponte* and Establishing Guidelines for Seeking Stay Applications, Securities Exchange Act Release No. 33870 (April 7, 1994).

<sup>6</sup> The Exchange represents that it relies on the Commission's guidelines in proposing these factors.

<sup>7</sup> The Exchange represents that the Board Appeals Committee will notify the applicant of its denial of a request for a stay, as well as the reasons for its denial. Telephone conversation between Mai S. Shiver, Senior Attorney, Regulatory Policy, PCX, and Sapna C. Patel, Attorney, Division of Market Regulation, Commission, on January 8, 2002.

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

<sup>9</sup> 15 U.S.C. 78f(b)(5).

competition and to protect investors and the public interest by standardizing the method by which stays of committee decisions are made. The Exchange also believes that this proposal, as amended, is consistent with Section 6(b)(4) of the Act<sup>10</sup> because it provides for the equitable allocation of reasonable dues, fees and other charges among members, issuers and other 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 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*

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 and Amendment No. 1 are 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 PCX. All submissions should refer to File No. SR-PCX-2002-20 and should be submitted by February 5, 2003.

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

**J. Lynn Taylor,**

*Assistant Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-47140; File No. SR-Phlx-2002-76]

### **Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Certain Rules Governing Participation in Crossing Transactions Effected on the Exchange**

January 8, 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 November 21, 2002, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Phlx. 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 Phlx, pursuant to Rule 19b-4 of the Act, proposes to amend certain Phlx Rules governing participation in crossing transactions effected on the Exchange. Specifically, the Phlx proposes to amend Phlx Rule 126, adding Supplementary Material (h) instituting an alternative procedure for crossing certain orders of 10,000 shares or greater (the "Alternative Procedure"). In addition, the Phlx proposes to amend Phlx Rule 229B, to allow specialists and floor brokers on the Exchange's equity floor to take advantage of the Alternative Procedures electronically.

The text of the proposed rule change is below. Proposed new language is in

*italics*; proposed deletions are in brackets.

\* \* \* \* \*

#### **Crossing" Orders**

**Rule 126.** When a member has an order to buy and an order to sell the same security, he must offer such security at a price which is higher than his bid by the minimum variation permitted in such security before making a transaction with himself.

*Supplementary Material*

(a)-(g) No Change.

(h) *If prior to presenting a cross transaction involving 10,000 shares or more, a member requests that the specialist post the current market for the security ("Updated Quotation"), the member may execute a cross transaction:*

(i) *at the Updated Quotation, if both sides of the cross transaction are agency orders and the Updated Quotation contains no agency orders; or*

(ii) *between the Updated Quotation, without interference by another member. In no event shall an agency order on the book having time priority, remain unexecuted after any other order at its price has been effected pursuant to this rule or otherwise.*

\* \* \* \* \*

#### **[Order Entry Window] Alternative Electronic Order Entry**

**Rule 229B.** (a) *Floor Brokers and Specialists may elect to enter orders through an order entry window (the "Order Entry Window" or "OEW"), which will route orders to the appropriate specialist, in accordance with Rule 229A, with all OEW orders treated as Non-Directed Orders, as that term is defined in Rule 229A. Specialists may enter orders only in those stocks that they have been approved to trade as a specialist by the Equity Allocation, Evaluation and Securities Committee. Orders sent through the OEW will be displayed to the specialist for a period of time to be determined by the Exchange. During that time, the specialist can choose to interact with the OEW order. At the end of the time period, absent previous specialist action, the OEW order will be automatically executed or cancelled.*

(b) *Specialists and Floor Brokers may enter cross transactions electronically in accordance with the Phlx Rule 126(h).*

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#### **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 Phlx included statements concerning

<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.

<sup>10</sup> 15 U.S.C. 78f(b)(4).