

in order to revise its Designated Examination Authority ("DEA") Fee exemption. The text of the proposed rule 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 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 to amend the regulatory fee portion of its Fees in order to revise the DEA Fee exemption. The Exchange currently charges a DEA fee in order to recover costs associated with regulation relative to those DEA member firms that do not conduct a certain portion of their trading activity on the PCX. The Exchange requires all traders to pay an initial registration fee of \$75 per trader and an annual fee thereafter of \$250 per trader. In addition, a \$2,000 per month examination fee applies to firms for whom the PCX is the DEA. For firms that conduct a substantial portion of their business on the Exchange floor, however, these costs are deemed to be offset by contract revenue. Thus, the Exchange allows an exemption to those member organizations that can demonstrate that at least 25% of their income was derived from on-floor activities.

The Exchange seeks to make a minor amendment to the existing DEA Fee exemption. The revised DEA Fee exemption will allow an exemption for any PCX Registered Floor Broker or Marker Maker<sup>3</sup> that effects at least 25% of all securities transactions, as measured in contract or share volume, on the PCX Floor or any other PCX Options trading facility, including PCX Plus. The Exchange believes that this amendment more accurately reflects the application of the exemption and

<sup>3</sup> Pursuant to PCX Rule 6.1(c)(2), the term "Market Maker" includes Lead Market Maker, Remote Market Maker, Floor Market Maker and Supplemental Market Maker.

references the Exchange's new trading platform, PCX Plus. The Exchange states that the underlying purpose of the exemption, recovery of costs<sup>4</sup> associated with providing regulatory services to off-floor trading firms that do not conduct their trading activity on the Exchange, remains unchanged.

#### 2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,<sup>5</sup> in general, and Section 6(b)(4) of the Act,<sup>6</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

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>7</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder,<sup>8</sup> because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days after 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.

<sup>4</sup> These include costs related to advising firms on financial reporting requirements and compliance with PCX and Commission rules. There are also extensive travel costs and more complex regulation related to such firms.

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

<sup>6</sup> 15 U.S.C. 78f(b)(4).

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>8</sup> 17 CFR 240.19b-4(f)(2).

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 number SR-PCX-2003-52 and should be submitted by October 27, 2003.

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

**Jill M. Peterson,**  
Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48565; File No. SR-PCX-2003-20]

### Self-Regulatory Organizations; Pacific Exchange, Inc.; Order Approving Proposed Rule Change and Amendments No. 1 and 2 and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 3 Relating to the Limitation of Liability of the Options Clearing Corporation to Exchange Members

September 30, 2003.

#### I. Introduction

On April 28, 2003, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to adopt PCX Rule 13.5. On August 4, 2003, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> On August 7, 2003, the PCX

<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 letter from Tania J. Cho, Staff Attorney, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation

submitted Amendment No. 2 to the proposed rule change.<sup>4</sup> The proposed rule change, as amended, was published for comment in the **Federal Register** on August 19, 2003.<sup>5</sup> On September 16, 2003 the PCX submitted Amendment No. 3 to the proposed rule change.<sup>6</sup>

The Commission received no comments on the proposed rule change, as amended. This order approves the proposed rule change, as amended, and issues notice of, and grants accelerated approval to, Amendment No. 3.

## II. Description of the Proposed Rule Change

Pursuant to the Linkage Project and Facilities Management Agreement (“Agreement”),<sup>7</sup> the Linkage Participants, including the Exchange, are required to file a proposed rule change with the Commission to provide the Options Clearing Corporation (“OCC”) with limited liability with respect to the members’ use of the Options Intermarket Linkage (“Linkage”). The PCX represents that it filed this proposed rule change to fulfill its obligation under the Agreement. The PCX proposes to adopt PCX Rule 13.5(b) to limit the liability for the OCC with respect to PCX members’ use of the Linkage.

The Exchange also proposes to adopt PCX Rule 13.5(a) to provide that the Linkage, as used to send orders and other information to or from the Exchange, is a facility or service afforded by the Exchange for purposes of PCX Rule 13.2.<sup>8</sup> The proposed rule change provides that the OCC would have no liability to PCX members, with respect to the use, non-use, or inability to use the Linkage.

Lastly, the PCX proposed to carve out an exception for the Linkage system in

existing PCX Rule 13.2(b). The Exchange represents that this rule, which addresses the Exchange’s liability for the negligent acts of its employees or failure of its systems or facilities whenever custody of an unexecuted customer order is transmitted by a member through the Exchange’s automated facilities, is not intended to apply to the Linkage system, and that, therefore, the carve-out is appropriate.

## III. Discussion

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange<sup>9</sup> and, in particular, the requirements of section 6(b) of the Act<sup>10</sup> and the rules and regulations thereunder. The Commission finds that the rule change, as amended, is consistent with section 6(b)(5) of the Act,<sup>11</sup> which requires, among other things, that the rules of the Exchange be designed to foster cooperation and coordination with persons engaged in regulation, 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.

The Commission believes that this proposed rule change, as amended, should foster cooperation and promote a relationship between the PCX and the OCC that is conducive to the effective operation of the Linkage. Further, the Commission believes that the PCX’s proposals to characterize the Linkage as a facility or service of the Exchange and to except the Linkage system from PCX Rule 13.2(b) are reasonable.

The Commission finds good cause, pursuant to section 19(b)(2) of the Act, for approving Amendment No. 3 prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. In Amendment No. 3, the PCX changed the phrase “members or persons associated therewith,” which was contained in the portion of the proposed rule text pertaining to the OCC’s liability to such persons, to “members or associated persons.” The Commission believes that this change will ensure that customers of a member or others who do business with a

member, but are not under the control of, or employed by, the member, are not inadvertently affected by the proposed rule change.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 3, including whether Amendment No. 3 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 also will be available for inspection and copying at the principal office of the PCX. All submissions should refer to File No. SR-PCX-2003-20 and should be submitted by October 27, 2003.

## V. Conclusion

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change, as amended (File No. SR-PCX-2003-20) is approved, and Amendment No. 3 is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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(“Division”), Commission, dated August 1, 2003 (“Amendment No. 1”). In Amendment No. 1, the Exchange submitted a new Form 19b-4, which replaced the original filing in its entirety.

<sup>4</sup> See letter from Tania J. Cho, Staff Attorney, Regulatory Policy, PCX, to Deborah L. Flynn, Assistant Director, Division, Commission, dated August 7, 2003 (“Amendment No. 2”). In Amendment No. 2, the Exchange removed a disclaimer provision contained in the proposed rule text, PCX Rule 13.5(c).

<sup>5</sup> Securities Exchange Act Release No. 48322 (August 12, 2003), 68 FR 49831.

<sup>6</sup> See letter from Tania J. Cho, Staff Attorney, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division, Commission, dated September 2, 2003 (“Amendment No. 3”). In Amendment No. 3, the Exchange proposed to change the term “persons associated” to “associated persons” in proposed PCX Rule 13.5(a) and (b).

<sup>7</sup> Linkage Project and Facilities Management Agreement (January 30, 2003).

<sup>8</sup> PCX Rule 13.2, among other things, describes the extent of the Exchange’s liability to members for use of the facilities and services provided by the Exchange.

<sup>9</sup> In approving this proposed rule change, as amended, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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

<sup>11</sup> 15 U.S.C. 78f(b)(5).

<sup>12</sup> *Id.*

<sup>13</sup> 17 CFR 200.30-3(a)(12).