

trade-through the price of a market participant that does not accept automatic execution or charges a quote access fee. Thus, ECNs that provide depth and liquidity at or near the inside market would continue to receive executions. In addition, the use of Auto-Ex orders would be voluntary and there may be many instances where this order type would not be appropriate. For example, as stated by Nasdaq, use of an Auto-Ex order may be inappropriate where an ECN's Quote/Order is the predominant source of liquidity at the inside market for a particular stock or when a market participant seeks to access all available liquidity through SuperMontage.<sup>14</sup> In the latter example, a market participant may elect to use a regular non-directed order, rather than the Auto-Ex order. Therefore, the Commission believes that the Auto-Ex order is reasonably designed to accommodate the participation of ECNs and other market participants in SuperMontage, to give market participants greater flexibility in determining how their orders will be executed, and to provide greater opportunities to control execution and routing costs.

Inet and Bloomberg commented that the Auto-Ex order "undercuts" the principle of price/time priority in SuperMontage. However, the Commission notes that SuperMontage has never been a trading environment characterized by strict price/time priority. For example, SuperMontage has order execution algorithms based on price/size/time and price/time taking into account ECN fees, which may be used on an order-by-order basis, as well as Preferred Orders, which execute solely against the Quote/Order of a recipient identified by the participant entering the order at the best bid or offer regardless of the recipient's time priority within the price level, and Directed Orders, which can be directed to a particular market participant at any price. The Commission notes that the Auto-Ex order, while not identical, has functional similarities to these current Nasdaq features, including the order execution algorithm based on price/time priority that takes access fees into account and Preferred Orders.

Inet also commented that the Auto-Ex order was not like the ArcaEx Fill-or-Return order. The Commission recognizes that distinctions may be drawn between the Auto-Ex order and the ArcaEx Fill-or-Return order. Nonetheless, the Commission believes that the Auto-Ex order provides functionality and flexibility for market

participants that is similar to the ArcaEx Fill-or-Return order. In particular, the Auto-Ex order, like the Fill-or-Return order, permits a market participant to determine whether its order will be routed away to an alternate market. Thus, while the Auto-Ex order is not identical to the Fill-or-Return order, both orders give the market participant some ability to control where its order is routed.

The Commission also believes that the proposed Auto-Ex order may provide greater speed and certainty of execution. The Commission recognizes that an Order-Delivery ECN may determine to reject an order to avoid dual liability or because a fee dispute exists with a contra-party. If an order is rejected and returned to SuperMontage, market conditions, especially during a fast market, may change and the order may receive an inferior execution. Thus, the Commission believes that an Auto-Ex order may help to assure the quality of execution in certain market conditions. The Commission also notes that market participants that have access fee disputes with ECNs could use the Auto-Ex order to avoid ECNs that will reject their orders. In such an instance, the Commission believes that the use of an Auto-Ex order may benefit the Order-Delivery ECN and the market participant with which the fee dispute exists as the respective interest of the parties could potentially interact with contra-parties with which no fee dispute exists.

Notwithstanding the foregoing, the Commission emphasizes that broker-dealers must evaluate whether the use of the Auto-Ex order type is consistent with their best execution obligations. As the Commission has previously stated, the customer's instructions and expectations should determine the order handling procedures that a broker-dealer employs and whether the execution of an order is the best under the circumstances. Without specific instructions from a customer, however, a broker-dealer should periodically assess the quality of competing markets to ensure that its order flow is directed to markets providing the most advantageous terms for the customer's order.<sup>15</sup> Currently, market participants have the choice, in part, of using Nasdaq's facility to access liquidity or private linkages outside of SuperMontage to access liquidity. As a result, broker-dealers must be able to identify the best available terms among multiple competing marketplaces and

be able to access those marketplaces.<sup>16</sup> An inability to reach quotations and execute among market centers can compromise a broker-dealer's ability to satisfy its duty of best execution. For example, it could be inconsistent with a broker-dealer's duty of best-execution to use Auto-Ex orders if such use regularly leads to a failure to obtain the best available price for customers' orders. Thus, while the Commission has permitted Nasdaq to develop a market structure that gives its market participants operational flexibility, the Commission emphasizes that market participants must utilize SuperMontage functions in a manner that is consistent with their best execution obligations.

## V. Conclusion

For the foregoing reasons, the Commission finds that the proposal is consistent with the requirements of the Act and rules and regulations thereunder.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>17</sup> that the proposed rule change and Amendment Nos. 1, 2, and 3 thereto (File No. SR-NASD-2003-143) are approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>18</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49018; File No. SR-PCX-2003-49]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 by the Pacific Exchange, Inc. Eliminating the Requirement that Market Makers With No Public Accounts and Who Do Not Solicit Public Accounts, Maintain Certain Information Barriers

January 5, 2004.

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 September 16, 2003, the Pacific Exchange, Inc. ("PCX" or "Exchange"), through its subsidiary, PCX Equities,

<sup>16</sup> See Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2001) (Order approving SR-NASD-99-53).

<sup>17</sup> 15 U.S.C. 78s(b)(2).

<sup>18</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>15</sup> See *Market 2000: An Examination of Current Equity Market Developments*, Division, Commission, (January 1994), Study V at 4.

<sup>14</sup> See Nasdaq Letter, *supra* note 7.

Inc. ("PCXE"), 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. On December 16, 2003, the Exchange amended the proposal.<sup>3</sup> 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 Exchange, through PCXE, proposes to eliminate the Information Barrier requirement set forth in PCXE Rule 7.26 in the limited circumstances where a Market Maker, which also functions as a General Authorized Trader,<sup>4</sup> engages solely in proprietary trading and does not, under any circumstance, maintain customer accounts or solicit or accept orders from or on behalf of public customers. 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, 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. 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 Information Barrier requirements set forth in PCXE Rule 7.26 provide critical safeguards to prevent the use or communication of material non-public information by market making firms (and affiliated broker-dealers) to inappropriately benefit other business activities in which they may engage, such as investment banking or options

market making. Such information could relate to, for example, the Market Maker's customer and directed order flow or other information obtained by the Market Maker in the course of its business. Such barriers help to ensure that market making firms do not illegally take advantage of or communicate such information to benefit their other business activities, to the detriment of investors, customers, issuers and the integrity of the market.

For business reasons, certain registered Market Makers, or broker-dealers with which such Market Makers are affiliated, engage solely in proprietary trading. Accordingly, such firms do not maintain public customer accounts or solicit or accept orders or funds (and hence, would not accept directed order flow) from or on behalf of public customers, including broker-dealers and other securities firms. Under such circumstances, because the market making firm does not engage in any other business activities that may benefit from information obtained by the Market Maker in the course of the firm's market making activities, the Exchange believes that the concerns noted above which form the basis for the Information Barrier requirements set forth in Rule 7.26 do not apply.<sup>5</sup> Nevertheless, Rule 7.26 would require such a firm to develop and implement Information Barriers.

Under such circumstances, the Exchange believes that an Information Barrier requirement is not necessary and would impose an undue burden on the market making firm. Accordingly, this rule filing proposes to eliminate this requirement in the limited circumstances where a market making firm and its affiliated broker-dealer do not maintain public customer accounts, nor solicit or accept public customer orders, including from broker-dealers and other securities firms (and does not accept directed order flow or utilize any order type which presupposes the participation of public customers), and engage solely in proprietary trading. The Exchange believes that this limited modification is consistent with the purposes of the rule. However, if the market making firm or its affiliated broker-dealer subsequently decides to maintain public customer accounts or solicit public customer accounts (and directed order flow or order types which presuppose the participation of public customers), then the requirements of Rule 7.26 would apply. Further, this

<sup>5</sup> The proposed rule change is designed to accommodate the needs of these market makers. The current rule did not foresee the business conditions that currently exist which necessitate this change.

limited modification would not alter or adjust any other obligation imposed on Market Makers, including those set forth in PCXE Rules 7.21 (Obligations of Market Maker Authorized Traders)<sup>6</sup> and 7.23 (General Obligations of Market Makers).

##### **2. Statutory Basis**

The Exchange believes that the proposal furthers the objectives of Section 6(b)(5) of the Act<sup>7</sup> in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest.

#### *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.

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

Written comments were neither solicited nor 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. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-PCX-2003-49. This file number should be included on the subject line if e-mail is used. To help the

<sup>6</sup> See PCXE Rule 1.1(v) (definition of "Market Maker Authorized Trader").

<sup>7</sup> 15 U.S.C. 78(b)(5).

<sup>3</sup> See December 15, 2003 letter from Steven B. Matlin, Senior Counsel, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, and attachment ("Amendment No.1"). Amendment No. 1 replaces and supersedes the original proposed rule change in its entirety.

<sup>4</sup> See PCXE Rule 1.1(o) (definition of "General Authorized Trader").

Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. 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-2003-49 and should be submitted by February 2, 2004.

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

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 04-523 Filed 1-9-04; 8:45 am]

**BILLING CODE 8010-01-P**

## TENNESSEE VALLEY AUTHORITY

### Sunshine Act Meeting

**AGENCY HOLDING THE MEETING:** Tennessee Valley Authority (Meeting No. 1549).

**TIME AND DATE:** 9 a.m. (e.s.t.), January 14, 2004; TVA West Tower Auditorium, 400 West Summit Hill Drive, Knoxville, Tennessee.

**STATUS:** Open.

### Agenda

Approval of minutes of meeting held on November 5, 2003.

#### *New Business*

#### F—Other

F1. Tennessee Valley Authority Strategic Plan

#### C—Energy

C1. Contract with BOC Gases for industrial gases and cylinders, tube trailers, and bulk storage management.

C2. Contract with Brand Scaffold Services, Inc., for purchase, rental, and erection/teardown of scaffolding.

C3. Supplement to contract with Thermal Engineering International for the upgrade of moisture separators at Browns Ferry Nuclear Plant.

C4. Contract with Scott Specialty Gases, Inc., for protocol gases.

C5. Contracts with Electric Motor Repair & Sales Company; Hibbs ElectroMechanical, Inc.; Jay Electric Company, Inc.; REMCO; and Southwest Electric Company for electric motor repair services.

C6. Contract with Conformal Clad, Inc., for the supply of coated replacement induced draft fan blades for Kingston Fossil Plant.

C7. Delegation of authority to the Executive Vice President, Fossil Power Group, to enter into contracts with Arch Coal Sales Company, Nally and Hamilton Enterprises Inc., and Progress Fuels Corporation for Appalachian Basin coal for John Sevier and Bull Run Fossil Plants.

#### E—Real Property Transactions

E1. Modification of certain deed restrictions affecting approximately 21 acres of former TVA land on Tellico Reservoir in Monroe County, Tennessee, Tract No. XTELR-6 S.1X, to allow for construction of a public school.

E2. Sale of a noncommercial, nonexclusive permanent easement to A. Robert Johnson for construction and maintenance of private water-use facilities, affecting approximately 0.4 acre of land on Tellico Reservoir in Loudon County, Tennessee, Tract No. XTELR-245RE.

E3. Sale of a noncommercial, nonexclusive permanent easement to Geneva and Raymond Anderson for construction and maintenance of private water-use facilities, affecting approximately 0.04 acre of land on Tellico Reservoir in Monroe County, Tennessee, Tract No. XTELR-246RE.

E4. Grant of a permanent easement to Scottsboro Water, Sewer, and Gas Board for construction of a building to house a potable water tank, affecting approximately 0.03 acre of land on Guntersville Reservoir in Jackson County, Alabama, Tract No. XTGR-175E.

E5. Grant of a permanent easement to the State of Tennessee for a highway improvement project, affecting approximately 0.13 acre of land on Normandy Reservoir in Bedford County, Tennessee, Tract No. XTNRMRD-4H.

E6. Sale at public auction of four separate tracts of land adjacent to the Niles Ferry Industrial Park, consisting of approximately 4.8 acres on Tellico Reservoir in Monroe County, Tennessee, Tract Nos. XTELR-240, -241, -242, and -243.

E7. Sale of a permanent easement to BECS, General Partnership, for a road and utilities access, affecting approximately 0.97 acre of land on Cherokee Reservoir in Grainger County, Tennessee, Tract No. XCK-585E.

#### F—Other (con't.)

F2. Approval to file condemnation cases to acquire easements and rights-of-way for TVA power transmission line projects affecting the Basin-Toccoa Transmission Line in Fannin County, Georgia; Gallatin Steam Plant-Rockwood No. 2 Tap to North Lebanon Transmission Line in Wilson County, Tennessee, and the Waynesboro-Clifton City Transmission Line in Wayne County, Tennessee.

#### *Information Items*

1. Approval of term coal contracts to Arch Coal Sales Company for Powder River Basin coal and Uinta Basin coal to supply various TVA fossil plants.

2. Approval of a term coal contract to Oxbow Mining LLC for Uinta Basin coal to supply various TVA fossil plants.

3. Approval of delegation of authority to the Executive Vice President, Fossil Power Group, to renegotiate coal Contract No. CO0058 with Bowie Resources Limited for supply of coal to various TVA fossil plants.

4. Amendments to the Provisions of the TVA Savings and Deferral Retirement Plan.

5. Approval of Fiscal Year 2004 Winning Performance Team Incentive Plan Scorecards.

6. Approval of the renewal of the Regional Resource Stewardship Council charter for an additional two years.

7. Approval of a supplement to the contract with Electric Power Research Institute, Inc., to extend TVA's membership through December 2004.

8. Approval of a contract with GE Fleet Services for maintenance of TVA's light fleet vehicles.

9. Approval of a public auction sale of the Johnson City Customer Service Center site, consisting of approximately 11 acres in Washington County, Tennessee, Tract No. XJCPSC-4.

10. Approval of a 1-year extension of ferrosilicon industry pricing arrangements.

11. Approval of revised Business Practice 8, Inventions.

For more information: Please call TVA Media Relations at (865) 632-6000, Knoxville, Tennessee. Information is also available at TVA's Washington Office (202) 898-2999. People who plan to attend the meeting and have special needs should call (865) 632-6000. Anyone who wishes to comment on any of the agenda in writing may send their comments to: TVA Board of Directors, Board Agenda Comments, 400 West Summit Hill Drive, Knoxville, Tennessee 37902.

<sup>8</sup> 17 CFR 200.30-3(a)(12).