

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>11</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder,<sup>12</sup> because it establishes or changes a due, fee, or other charge imposed by the self-regulatory organization. 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.<sup>13</sup>

### 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-NASD-2004-019. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hard copy 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 NASD. All submissions should refer to File No. SR-NASD-2004-019 and should be submitted by March 16, 2004.

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>12</sup> 17 CFR 240.19b-4(f)(2).

<sup>13</sup> For the purpose of calculating the 60-day abrogation period, and the date that the proposed rule change is immediately effective, the Commission considers the proposed rule change to have been filed on February 10, 2004; the date Nasdaq filed Amendment No. 2.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

Margaret H. McFarland,  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49263; File No. SR-PCX-2004-05]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Exchange, Inc. To Amend Its Rules To Impose a Connectivity Fee Applicable to Non-Members That Maintain a Connectivity Line With the Exchange

February 17, 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 January 28, 2004, 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 Exchange. 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 is proposing to amend the Floor, Market Maker and Remote Market Maker Fees portion of its Schedule of Fees and Charges ("Schedule"). The text of the proposed change to the fee schedule is available at 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 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.

<sup>14</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.

#### 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 Floor, Market Maker and Remote Market Maker portion of its Schedule in order to create a connectivity fee of \$300 per line per month that would be applicable to non-members that maintain a connectivity line with the Exchange.

On December 12, 2003, the Exchange filed a proposed rule change to implement a connectivity fee applicable to members of the Exchange.<sup>3</sup> This fee became effective upon filing.<sup>4</sup> At this time, the Exchange wishes to implement the same connectivity fee applicable non-members.<sup>5</sup> As the Exchange previously stated, it maintains a significant number of telecommunications lines that support connectivity from various routing firms from both members and non-members of the Exchange. Thus, the PCX dedicates a significant amount of resources to installation and maintenance. The installation and maintenance costs for these lines are the same for members and non-members. Therefore, the Exchange believes that the proposed fee will provide for the cost recovery of the expenses incurred as part of the initial deployment and ongoing testing of these lines.

##### 2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,<sup>6</sup> in general, and Section 6(b)(4) of the Act,<sup>7</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

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

The Exchange does not believe that the proposed rule change will impose

<sup>3</sup> See Securities Exchange Act Release No. 48970 (December 22, 2003), 68 FR 75306 (December 30, 2003) (SR-PCX-2003-67).

<sup>4</sup> See Section 19(b)(3)(A)(ii) of the Act. 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>5</sup> The Exchange does not anticipate that a significant number of non-members will be billed as a result of this proposed rule change. However, the proposed rule change attempts to align the connectivity fee with the parties that are establishing connections with this market center, irrespective of whether the parties are members. Accordingly, the Exchange is expanding the scope of the connectivity fee so that it can appropriately assess the fee on non-member firms such as correspondents and service bureaus.

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

<sup>7</sup> 15 U.S.C. 78f(b)(4).

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 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*. All comment letters should refer to File No. SR-PCX-2004-05. This file number should be included on the subject line if e-mail is used. To help the 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-2004-05 and should be submitted by March 16, 2004.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-49264; File No. SR-PCX-2003-49]

**Self-Regulatory Organizations; Order Approving 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**

February 17, 2004.

**I. Introduction**

On September 16, 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 eliminate the Information Barrier requirement set forth in PCXE Rule 7.26 for certain Market Makers. On December 16, 2003, PCX amended the proposed rule change.<sup>3</sup> The proposed rule change, as amended, was published for comment in the **Federal Register** on January 12, 2004.<sup>4</sup> No comment letters were received on the proposal. This order approves the proposed rule change.

**II. Description of the Proposal**

The Information Barrier requirements set forth in PCXE Rule 7.26 are designed to provide safeguards to prevent the use or communication of material non-public information by market making firms (and affiliated broker-dealers) to inappropriately benefit 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. PCX believes that such barriers help to ensure that market making firms do not illegally take advantage of or communicate such information to benefit their 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 PCXE Rule 7.26 do not apply.<sup>5</sup> Nevertheless, PCXE 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, the PCX proposes to eliminate this requirement in the limited circumstances where a market making firm and its affiliated broker-dealer neither 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 PCXE Rule 7.26

<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.

<sup>8</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 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 replaced and superseded the PCX's original filing in its entirety.

<sup>4</sup> Securities Exchange Act Release No. 49018 (January 5, 2004), 69 FR 01771.