

proposed rule change (File No. SR-NASD-2004-05) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁸

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49276; File No. SR-PCX-2003-70]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. To Amend PCXE Rule 7.40 To Provide for the Dissemination of a Closing Price and Closing Volume

February 19, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 22, 2003, the Pacific Exchange, Inc. ("PCX" or "Exchange"), through its wholly owned subsidiary PCX Equities, Inc. ("PCXE"), 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 Exchange. On February 12, 2004, the Exchange submitted Amendment No. 1 to the proposed rule change.³ 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 proposes to modify PCXE Rule 7.40 to provide for the dissemination of a Closing Price. The text of the proposed rule change appears below. Proposed new language is in *italics*. Proposed deletions are in brackets.

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Rule 7.40, Trade Execution and Reporting

Rule 7.40. Executions occurring as a result of orders matched against the

Arca Book shall be reported by the Corporation to an appropriate consolidated transaction reporting system. Executions occurring as a result of orders routed away from the Archipelago Exchange shall be reported to an appropriate consolidated transaction reporting system by the relevant reporting market center. The Archipelago Exchange shall promptly notify Users of all executions of their orders as soon as such executions take place.

(1.) Reporting Opening and Closing Prices

(a)—Reserved

(b) Dissemination of Closing Price and Volume

At the conclusion of the Closing Auction, the Archipelago Exchange will publish a Closing Price and volume pursuant to the following:

(i) If a Closing Auction occurs, the Closing Price will be the Closing Auction Price with volume executed at the Closing Auction Price; or

(ii) If no Closing Auction occurs, the Closing Price will be the volume weighted average price ("VWAP") based on transactions reported to a consolidated transaction reporting system during the last two minutes of the Core Trading Session and the associated volume reported to a consolidated transaction reporting system during that time period; or

(iii) If there are no transactions reported to a consolidated transaction reporting system during the last two minutes of the Core Trading Session, the Closing Price will be the last trade price as reported to a consolidated transaction reporting system during the trading day and the volume reported to a consolidated transaction reporting system associated with that trade; or

(iv) If there are no trades reported to a consolidated transaction reporting system during the trading day, the Closing Price and volume will be that of the most recent trading day's close for that particular security.

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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 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.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend PCXE Rule 7.40 relating to Trade Execution and Reporting to provide for the dissemination of a Closing Price and closing volume. This proposal would allow the Archipelago Exchange ("ArcaEx") facility to calculate and report a Closing Price for both over-the-counter ("OTC") and exchange-listed securities traded on ArcaEx to the Consolidated Tape and provide Equity Trading Permit ("ETP") Holders and other consumers of market data with additional information about the market close.

The Commission recently approved amendments to PCXE rules regarding Closing Auctions (PCXE Rule 7.35(e))⁴ that describe ArcaEx's Closing Auction process. The ArcaEx Closing Auction incorporates a Closing Auction Price and volume based on the Indicative Match Price, Market Imbalance and Total Imbalance relative to the Closing Auction. The Commission noted that publishing this information may provide market participants with an additional source of closing price information for Nasdaq and exchange-listed securities in addition to the information disseminated by markets, which should enhance intermarket competition by enabling market participants to assess and compare pricing among different markets.⁵ The proposed change to PCXE Rule 7.40(1)(b)(i) clarifies that in the case where there is a Closing Auction in either OTC or exchange-listed securities,⁶ the Closing Price and volume will be the Closing Auction Price and the associated volume executed at that price.

Where there is no Closing Auction pursuant to PCXE Rule 7.35(e), the Exchange proposes to base the Closing Price for OTC and exchange-listed securities on a consolidated volume weighted average price ("VWAP") based on transactions reported to a

⁴ See Securities Exchange Act Release No. 48883 (December 4, 2003), 68 FR 69748 (December 15, 2003) (SR-PCX-2003-24).

⁵ See *id.*

⁶ The Exchange intends to implement the Closing Auction functionality previously approved by the Commission under SR-PCX-2003-24 in OTC securities initially and will follow with implementation of the Closing Auction functionality in exchange-listed securities at a later date. *Id.*

⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ On February 12, 2004, the Exchange filed a Form 19b-4, which replaced the original filing in its entirety ("Amendment No. 1").

consolidated transaction reporting system⁷ during the last two minutes of the Core Trading Session and the associated volume reported to a consolidated transaction reporting system during that time period. The Exchange believes that this will serve to provide a market wide Closing Price and an accurate indication of the Closing Price to investors. If there are no consolidated trades reported during the last two minutes of the Core Trading Session, the Exchange proposes that the Closing Price and volume will be the last consolidated price reported during the trading day. In the event there are no consolidated trades reported during the trading day, the Exchange proposes to establish the Closing Price and volume as that of the most recent trading day's Closing Price and volume. Consistently, the Exchange will set the closing volume as the volume associated with the trades in each of the stated scenarios above.

To provide investors and users of the Closing Price data with transparency and clarity on the calculation of the Closing Price, the Exchange will provide a thorough description of the Closing Price calculation including the source of data used in determining the Closing Price in a notice to members that will be disseminated via the ArcaEx Web site, www.archipelago.com. Furthermore, the Closing Price will be disseminated via the Consolidated Tape utilizing a trade modifier⁸ to indicate the Closing Price and volume.

The Exchange believes that providing investors with an accurate representation of the market close is of critical importance. The Nasdaq Stock Market, Inc.⁹ received approval to implement an official closing price in

Nasdaq-listed securities. Moreover, Standard & Poors ("S&P") recently announced plans to utilize the American Stock Exchange, LLC closing price for twelve Nasdaq-listed stocks in the S&P 500. The Exchange believes that its proposed Closing Price calculation would provide a competitive alternative to other markets' closing price calculations.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)¹⁰ of the Act, in general, and furthers the objectives of Section 6(b)(5),¹¹ in particular, because it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments and perfect the mechanisms of a free and open market and to protect investors and the public interest.

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

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 self-regulatory organization consents, the Commission will:

A. By order approve the 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, as amended, is consistent with the Act. In particular, the Commission solicits comment on whether the Exchange should take any further steps to disclose to market participants when the Closing Price is based on transactions that occur on other exchanges or markets. 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-2003-70. 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 PCX. All submissions should refer to File No. SR-PCX-2003-70 and should be submitted by March 17, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland,
Deputy Secretary.

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⁷ Consolidated transaction reporting system refers to the UTDF data feed pursuant to the OTC/UTP Plan with respect to OTC securities and the Network A and Network B tickers pursuant to the CTA Plan with respect to exchange-listed securities.

⁸ For OTC securities, the Exchange will utilize a ".M" modifier to indicate the Closing Price which is currently available for OTC/UTP participants. The Exchange will work with the OTC/UTP Committee to develop an additional modifier that will be used to indicate the Closing Price when it is based on consolidated data rather than the ArcaEx Closing Auction. This modifier will be disseminated in addition to ".M" upon receiving approval from the OTC/UTP Committee. In addition, given that there is currently no modifier in use to indicate the Closing Price in exchange-listed securities, the Exchange will work with the CTA Committee and Securities Industry Automation Corporation ("SIAC") to establish an appropriate modifier to signify the Closing Price in exchange-listed securities and an additional modifier to use when the Closing Price is based on exchange-listed consolidated data rather than the ArcaEx Closing Auction.

⁹ See Securities Exchange Act Release No. 47517 (March 18, 2003), 68 FR 14446 (March 25, 2003) (SR-NASD-2002-158).

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

¹² 17 CFR 200.30-3(a)(12).