

marketplace by minimizing possible fails to deliver and eliminate regulatory disparities created when certain short sale orders are not conducted in compliance with the affirmative determination requirements. NASD further believes that extending the effective date will ensure that members have sufficient time to make the necessary programming changes to be able to comply with the new affirmative determination requirements.

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

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule*

Written comments were neither solicited nor received.

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

The proposed rule change has been filed by NASD as a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule series under Rule 19b-4(f)(1) under the Act.<sup>7</sup> Consequently, it has become effective pursuant to section 19(b)(3)(A) of the Act<sup>8</sup> and Rule 19b-4(f)(1) thereunder.<sup>9</sup>

At any time within 60 days of this filing, the Commission may summarily abrogate this proposal 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 changes 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. Comments may also be submitted electronically at the following email address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-NASD-2004-031. This file number should be included on the subject line

if email is used. To help the Commission process and review your comments more efficiently, comments should be sent in hard copy or by email but not by both methods.

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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 filings will also be available for inspection and copying at the principal offices of the NASD. All submissions should refer to the file numbers SR-NASD-2004-031 and should be submitted by March 17, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-49269; File No. SR-NASD-2004-05]

#### **Self Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Accelerated Approval of Proposed Rule Change to Amend NASD Rule 2370 Relating to Certain Lending Arrangements Between Registered Persons and Customers**

February 18, 2004.

On January 9, 2004, the National Association of Securities Dealers, Inc. ("NASD" or "Association") 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 amend NASD Rule 2370. Specifically, NASD proposed to exempt lending arrangements between family members as well as lending arrangements between registered persons and a financial institution or other entity or person regularly engaged in the business of providing credit, financing, or loans from the rule's notice

and approval requirements and to indicate that the scope of the rule is limited to lending arrangements between registered persons and their own customers, rather than any customer of the firm. The proposed rule change was published for comment in the **Federal Register** on January 23, 2004.<sup>3</sup> The Commission received no comment letters on the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association,<sup>4</sup> and, in particular, the requirements of section 15A(b)(6) of the Act,<sup>5</sup> which, among other things, requires that NASD rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and, in general, protect investors and the public interest. The Commission believes that the proposed rule change should allow NASD members to allocate supervisory and compliance resources to those loans where a potential for substantial abuse exists. The Commission notes that the proposed rule change only removes lending arrangements for which NASD believes the potential for misconduct is minimal from the rule's notice and approval process and that NASD members may continue to prohibit all lending arrangements between registered persons and customers altogether. The Commission also notes that NASD may bring a disciplinary action against a registered person who has entered into an unethical lending arrangement with a customer under NASD Rule 2110.

Furthermore, the Commission finds good cause for approving the proposed rule change prior to the thirtieth day after notice of the publication in the **Federal Register**. The Commission believes that acceleration of the approval of this proposal should allow NASD members to immediately focus on lending arrangements covered by amended NASD Rule 2370. Accordingly, the Commission finds good cause, consistent with section 19(b)(2) of the Act,<sup>6</sup> to approve the proposed rule change on an accelerated basis.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act<sup>7</sup>, that the

<sup>3</sup> See Securities Exchange Act Release No. 49081 (January 14, 2004), 69 FR 3410.

<sup>4</sup> In approving this proposed rule change, the Commission notes that it has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>5</sup> 15 U.S.C. 78o-3(b)(6).

<sup>6</sup> 15 U.S.C. 78s(b)(2).

<sup>7</sup> 15 U.S.C. 78s(b)(2).

<sup>7</sup> 17 CFR 240.19b-4(f)(1).

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f)(1).

<sup>10</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.

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.<sup>8</sup>

**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")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> 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.<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 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.

\* \* \* \* \*

#### 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.*

\* \* \* \* \*

#### 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))<sup>4</sup> 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.<sup>5</sup> 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,<sup>6</sup> 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

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

<sup>5</sup> See *id.*

<sup>6</sup> 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.*

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