

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49391; File No. SR-NYSE-2003-42]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. To Amend Its Rules 13, 72, 76 and 91 To Establish a Six-Month Pilot Program in Selected Stocks To Provide That Institutional XPress® Orders Be Executed Immediately Against an Institutional XPress® Eligible NYSE LiquidityQuoteSM Bid or Offer and Not Be Exposed for Price Improvement

March 10, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act") 1 and Rule 19b-4 thereunder,2 notice is hereby given that on December 16, 2003, the New York Stock Exchange, Inc. ("NYSE" 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. On February 20, 2004, the Exchange amended 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 NYSE is proposing to amend NYSE Rules 13, 72, 76 and 91 to establish a six-month pilot program in selected stocks to provide that Institutional XPress® orders be executed immediately against an Institutional XPress® eligible NYSE LiquidityQuoteSM bid or offer and not be exposed for price improvement. Below is the text of the proposed rule change, as amended. Proposed new language is in italics; proposed deletions are in [brackets].

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1 15 U.S.C. 78s(b)(1).
2 17 CFR 240.19b-4.
3 See letter from Mary Yeager, Assistant Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated February 19, 2004 ("Amendment No. 1"). In Amendment No. 1, the Exchange provided additional discussion on the size requirements for XPress® orders to trade with a LiquidityQuoteSM bid or offer, removed the last sentence of the proposed language in NYSE Rule 91.50, and renumbered the language proposed in NYSE Rule 91.50 to NYSE Rule 91.60.

Definitions of Orders

Rule 13

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XPress Order

An order to buy or sell a security for no less than such number of shares as the Exchange shall from time to time determine and no more than the displayed size of an XPress quote, as defined below, which order is to be executed [in whole or in part at the price of the XPress quote, if available, or at a better price if obtainable.] (i) in the case of an execution at the best bid or offer, or in the case of an execution at a liquidity bid or offer in a stock not part of the pilot program specified in (ii), in whole or in part at the price of an XPress-eligible bid or offer, if available, or at a better price, if obtainable; or (ii) in the case of an execution at a liquidity bid or offer, at the price of such XPress-eligible liquidity bid or offer pursuant to a pilot program in such stocks as the Exchange shall make known to its membership. The portion not so executed shall be treated as cancelled.

An XPress quote is a quote so indicated by the Exchange. In order to be indicated as an XPress quote, a published bid or offer must be at the same price, for no less than the number of shares and the minimum period of time that the Exchange shall from time to time determine. If the XPress bid or offer price changes or the published bid or offer size is less than such number of shares, the bid or offer shall no longer be indicated as an XPress quote. (See also Rule 72.50.)

The Exchange shall make known to its membership the minimum size for XPress orders and the minimum size and time requirements for XPress quotes.

XPress orders may be entered up to 3:58 p.m. or up until two minutes prior to any other closing time on the Exchange.

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Priority and Precedence of Bids and Offers

Rule 72

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.50 XPress Orders.—An execution of an XPress order, in whole or in part, shall not remove bids or offers from the Floor. Once an XPress order has been represented in the Crowd, no part of the XPress bid or offer against which the XPress order is to be executed shall be withdrawn, except to provide price improvement to all or part of the XPress order. When an XPress order has been

executed in part at an improved price, the remainder of such order shall be executed at the XPress bid or offer up to the number of shares then available, regardless of whether such number is less than the minimum size for an XPress quote. All XPress orders shall be executed in strict time priority with respect to each other. A member who is providing a better price to an XPress order must trade with all other market interest having priority at that price before trading with the XPress order. This rule shall not apply in the case of an XPress order received by the specialist seeking to trade against an XPress-eligible liquidity bid or offer pursuant to a pilot program in such stocks as the Exchange shall make known to its membership.

\* \* \* \* \*

"Crossing" Orders

Rule 76

When a member has an order to buy and an order to sell the same security, he shall, except for bonds traded through ABS® publicly offer such security at a price which is higher than his bid by the minimum variation permitted in such security before making a transaction with himself. All such bids and offers shall be clearly announced to the trading crowd before the member may proceed with the proposed "cross" transaction.

This rule shall not apply in the case of an XPress order received by the specialist seeking to trade against an XPress-eligible liquidity bid or offer pursuant to a pilot program in such stocks as the Exchange shall make known to its membership.

\* \* \* \* \*

Taking or Supplying Securities Named in Order

Rule 91

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Supplementary Material:
.10-.50. No Change.
.60 XPress Orders.—The provisions of this Rule shall not apply in the case of an XPress order received by the specialist seeking to trade against an XPress-eligible liquidity bid or offer containing any specialist proprietary interest, pursuant to a pilot program in such stocks as the Exchange shall make known to its membership.

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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. 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's Institutional XPress® ("XPress") rules provide that XPress orders are entitled to trade against an XPress eligible bid or offer without interference, and must be exposed for price improvement. The current criteria for determining when a bid or offer is Institutional XPress eligible are: (i) With respect to the best bid or offer, the share size must be for at least 15,000 shares, and have been published for at least 15 seconds; and (ii) with respect to a NYSE LiquidityQuote<sup>SM</sup> bid or offer,<sup>4</sup> such bid or offer must have been published at the same price for at least 15 seconds.

An XPress order seeking to trade against an XPress eligible best bid or offer must be for at least 15,000 shares. An XPress order seeking to trade against an XPress eligible NYSE LiquidityQuote<sup>SM</sup> ("liquidity") bid or offer must be for the size of such bid or offer.<sup>5</sup> Under the current rules, an XPress order must be executed in whole or in part at the price of the XPress quote, if available, or at a better price, if obtainable. The portion not so executed is canceled. The price improvement aspect of the rules applies to XPress eligible best bids and offers and XPress eligible liquidity bids or offers.

<sup>4</sup> NYSE Liquidity Quote<sup>SM</sup> is a real-time quote that shows the depth of market beyond the best bid or offer in the NYSE market reflecting at a single price the cumulative number of shares bid or offered on the limit order book, in the trading "crowd" and by the specialist as principal.

<sup>5</sup> In a prior filing, SR-NYSE-2002-55, the Exchange amended NYSE Rule 13.40 to provide that a NYSE LiquidityQuote<sup>SM</sup> bid or offer, regardless of size, will be XPress eligible if it has been published for at least 15 seconds, and that the minimum number of shares for an XPress order seeking to trade with a LiquidityQuote<sup>SM</sup> bid or offer must be for the size of such liquidity bid or offer. However, when the Exchange implemented NYSE LiquidityQuote<sup>SM</sup>, the Exchange initially required XPress orders to be for at least 15,000 shares when entered against a liquidity bid or offer. The Exchange expects that the different size requirements for XPress orders entered to trade with a liquidity bid or offer will be implemented in the near future. The Exchange represents that an Information Memo announcing the implementation will be distributed at that time. See Amendment No. 1, *supra* note 3.

According to the Exchange, there is a perceived difficulty with the current rules that may disincite entry of large limit orders which might be reflected in the published quotation as XPress eligible liquidity bids or offers. Concerns have been expressed to the Exchange that such orders would attract contra side XPress orders, which would not otherwise enter the market, and that these XPress orders may then receive price improvement. The Exchange believes that this results in liquidity-attracting XPress eligible limit orders remaining unexecuted, and possibly having to be re-entered at a worse price in order to be filled. Accordingly, the Exchange believes that such an outcome may undercut the viability of the XPress initiative to the community of investors that the Exchange seeks to attract.

In order to address these concerns, the Exchange proposes to implement a six-month pilot program in selected stocks to modify the XPress rules to eliminate the requirement that an XPress order be exposed for price improvement before trading with an XPress eligible liquidity bid or offer. The pilot stocks would include a mix of both active and moderately active stocks, as would be made known to the membership. Under this proposal, an XPress order would be executed against an available XPress eligible liquidity bid or offer without being exposed for price improvement. Members who wish to participate in executions in these pilot stocks when an XPress eligible liquidity bid or offer is published could do so by bidding or offering at higher (lower) prices prior to the specialist's receipt of an XPress order. Alternatively, members seeking to interact with any XPress order at the XPress eligible liquidity bid or offer price would have to first have their interest reflected in the XPress eligible liquidity published quotation.

The proposed rule change would amend the following rules: (i) NYSE Rule 13 to limit the broad reference to an XPress order receiving a better price if available, and to provide that an XPress order would be executed at the liquidity bid or offer price in the pilot stocks; (ii) NYSE Rule 72.50, which discusses how price improvement is provided to an XPress order, to reflect that it would not apply to the pilot stocks; (iii) NYSE Rule 76, which states the basic auction market crossing procedure for agency orders, to provide that it would not apply to an XPress order received by the specialist to trade against an XPress eligible liquidity bid or offer in the pilot stocks; and (iv) NYSE Rule 91, which requires crossing of an agency order before a member may trade with it as principal and contains

a requirement that the customer confirm a specialist's principal transaction with the customer's order, to provide that this rule would not apply where an XPress order is executed against an XPress eligible liquidity bid or offer that includes any specialist proprietary interest in the pilot stocks.

Although the Exchange is seeking at this time the authority to institute the pilot program, the Exchange would not actually implement the pilot program until certain technological enhancements are completed that would enable floor brokers to electronically input their trading interest into the Exchange's published quotation. The Exchange would notify the Commission as to the exact commencement date of the pilot program.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with section 6(b) of the Act,<sup>6</sup> in general, and furthers the objectives of section 6(b)(5),<sup>7</sup> in particular, because it is designed to promote just and equitable principles of trade, 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.

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

The Exchange does not believe that the proposed rule change, as amended, 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*

The Exchange has neither solicited nor received written comments on 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 the proposed rule change, or

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

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

(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 change, as amended, 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-NYSE-2003-42. 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 Section. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-NYSE-2003-42 and should be submitted by April 8, 2004.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04-6103 Filed 3-17-04; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49397; File No. SR-PCX-2004-10]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Implementing a New Fee To Recover Costs Associated With a Royalty Fee for Trading Options on an Exchange-Traded Fund

March 11, 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 February 18, 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 PCX has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the PCX under section 19(b)(3)(A)(ii) of the Act,<sup>3</sup> which renders the proposal effective upon filing with the Commission. 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 Trade-Related Charges portion of its Schedule of Fees and Charges ("Schedule") in order to implement a new fee to recover costs associated with a royalty fee. 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>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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

#### 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 Trade-Related Charges portion of its Schedule in order to implement a new fee to recover costs associated with a royalty fee for trading options on an Exchange-Traded Fund ("ETF"). In December 2003, the Exchange began trading options on the NASDAQ Fidelity Composite Index ("ONEQ"), an ETF. In order to recover the costs for the associated royalty fee, the Exchange is proposing to assess a \$0.12 fee per contract side to all Market Makers, Firms and Broker/Dealers. The Exchange represents that the customer side of an ONEQ transaction will not be assessed any fee. The Exchange believes that assessing this fee will provide adequate cost recovery for the royalty fee that the Exchange incurs for listing the ETF.

##### 2. Statutory Basis

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

The proposed rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act<sup>6</sup> and subparagraph (f)(2) of Rule 19b-4<sup>7</sup> thereunder, because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of the proposed rule change, the Commission

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

<sup>5</sup> 15 U.S.C. 78f(b)(4).

<sup>6</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>7</sup> 17 CFR 240.19b-4(f)(2).

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