

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50452; File No. SR-NYSE-2004-49]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Procedures for Companies That Fail To File Annual Reports in a Timely Manner

September 27, 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 August 19, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in items I, II, 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 proposed rule change amends the Exchange's Listed Company Manual to include procedures applicable to companies that fail to file annual reports with the Commission in a timely manner. The text of the proposed rule change is set forth below. Additions are in italics.

#### Listed Company Manual

\* \* \* \* \*

##### 802.01E SEC Annual Report Timely Filing Criteria

*A company that fails to file its annual report (Forms 10-K, 10-KSB, 20-F, 40-F or N-CSR) with the SEC in a timely manner will be subject to the following procedures:*

*Once the Exchange identifies that a company has failed to file a timely periodic annual report with the SEC by the later of (a) the date that the annual report was required to be filed with the SEC by the applicable form or (b) if a Form 12b-25 was timely filed with the SEC, the extended filing due date for the annual report, the Exchange will notify the company in writing of its status. For purposes of this Para. 802.01E, the later of these two dates will be referred to as the "Filing Due Date."*

*Within five days of receipt of this notification, the company will be*

*required to (a) contact the Exchange to discuss the status of the annual report filing, and (b) if it has not already done so, issue a press release disclosing the status of the filing. If the company fails to issue this press release in a timely manner, the Exchange will itself issue a press release stating that the company has failed to timely file its annual report with the SEC.*

*During the nine-month period from the Filing Due Date, the Exchange will monitor the company and the status of the filing, including through contact with the company, until the annual report is filed. If the company fails to file the annual report within nine months from the Filing Due Date, the Exchange may, in its sole discretion, allow the company's securities to be traded for up to an additional three-month trading period depending on the company's specific circumstances. If the Exchange determines that an additional trading period of up to three months is not appropriate, suspension and delisting procedures will commence in accordance with the procedures set out in Para. 804.00 of the Listed Company Manual. A company is not eligible to follow the procedures outlined in Paras. 802.02 and 802.03 with respect to this criteria.*

*In determining whether an additional up to three-month trading period is appropriate, the Exchange will consider the likelihood that the filing can be made during the additional period, as well as the company's general financial status, based on information provided by a variety of sources, including the company, its audit committee, its outside auditors, the staff of the SEC and any other regulatory body. The Exchange strongly encourages companies to provide ongoing disclosure on the status of the annual report filing to the market through press releases, and will also take the frequency and detail of such information into account in determining whether an additional three-month trading period is appropriate.*

*If the Exchange determines that an additional up to three-month trading period is appropriate and the company fails to file its periodic annual report by the end of the additional period, suspension and delisting procedures will commence in accordance with the procedures set out in Para. 804.00.*

*Note that if, at any time, the Exchange deems it necessary or appropriate in the public interest or for the protection of investors, trading in any security can be suspended immediately, and, in accordance with the procedures set out*

*in Para. 804.00, application made to the SEC to delist the 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 NYSE 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 and is set forth in Sections A, B, and C below.

##### 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 codify existing procedures followed where companies fail to satisfy the Commission's filing requirements for annual reports on Forms 10-K, 10-KSB, 20-F, 40-F, or N-CSR in a timely manner.

The Exchange closely monitors whether listed companies have filed their annual reports with the Commission as part of its continued listing program. At any given point over the past four years, no more than approximately two dozen NYSE-listed companies failed to file their annual reports with the Commission by the later of the date the filing was required to be made or, if the company filed a Form 12b-25 in a timely manner, by the extended due date. Most of these companies subsequently filed the required annual report within three to four months of the filing due date, and the vast majority of the remaining companies complied within six months of the filing due date. Cumulatively, approximately 13 companies took more than six months to make their filings over the past four years.

In all cases where a company failed to file its annual report by the filing due date, Exchange staff held regular discussions and meetings with each company's management, directors, regulators and advisors to monitor the status of the annual report filing and to determine whether to allow the company to continue to trade despite the continued failure to file an annual report with the Commission. In several of these situations, the Exchange ultimately moved to suspend the company's trading and delist its securities due to the length of time that passed without the company providing

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240-19b-4.

audited financial statements to the marketplace.

In order to formalize the process that the Exchange currently follows when a company has failed to file its annual report on a timely basis, the Exchange proposes to amend Section 802.01 of the Listed Company Manual as described below.

#### Proposed Section 802.01E

A company that fails to file its annual report (Forms 10-K, 10-KSB, 20-F, 40-F or N-CSR) with the Commission in a timely manner will be subject to the following procedures:

Once the Exchange identifies that a company has failed to file a timely periodic annual report with the Commission by the later of (a) the date that the annual report was required to be filed with the Commission by the applicable form or (b) if a Form 12b-25 was timely filed with the Commission, the extended filing due date for the annual report, the Exchange would notify the company in writing of its status. The later of these two dates would be referred to as the "Filing Due Date."

Within five days of receipt of this notification, the company would be required to (a) contact the Exchange to discuss the status of the annual report filing, and (b) if it has not already done so, issue a press release disclosing the status of the filing. If the company fails to issue this press release in a timely manner, the Exchange would itself issue a press release stating that the company has failed to timely file its annual report with the Commission.

During the nine-month period from the Filing Due Date, the Exchange would monitor the company and the status of the filing, including through contact with the company, until the annual report is filed. If the company fails to file the annual report within nine months from the Filing Due Date, the Exchange would be permitted, in its sole discretion, to allow the company's securities to be traded for up to an additional three-month trading period depending on the company's specific circumstances. If the Exchange determines that an additional trading period of up to three months is not appropriate, suspension and delisting procedures would commence in accordance with the procedures set out in Para. 804.00 of the Listed Company Manual. A company would not be eligible to follow the procedures outlined in Paras. 802.02 and 802.03 with respect to this criteria.

In determining whether an additional up to three-month trading period is appropriate, the Exchange would

consider the likelihood that the filing could be made during the additional period, as well as the company's general financial status, based on information provided by a variety of sources, including the company, its audit committee, its outside auditors, the staff of the Commission and any other regulatory body. The Exchange strongly encourages companies to provide ongoing disclosure on the status of the annual report filing to the market through press releases, and would also take the frequency and detail of such information into account in determining whether an additional three-month trading period is appropriate.

If the Exchange determined that an additional up to three-month trading period was appropriate and the company failed to file its periodic annual report by the end of the additional period, suspension and delisting procedures would commence in accordance with the procedures set out in Para. 804.00.

Note that if, at any time, the Exchange deemed it necessary or appropriate in the public interest or for the protection of investors, trading in any security could be suspended immediately, and, in accordance with the procedures set out in Para. 804.00, application made to the Commission to delist the security.

#### 2. Statutory Basis

The Exchange believes that the basis for this proposed rule change is the requirement under Section 6(b)(5)<sup>3</sup> of the Act that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

#### 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

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

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 proposal is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2004-49 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-NYSE-2004-49. 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, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 the filing also will be available for inspection and copying at the principal offices of the NYSE. All comments received will be posted

<sup>3</sup> 15 U.S.C. 78f(b)(5).

without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2004-49 and should be submitted on or before October 22, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>4</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E4-2450 Filed 9-30-04; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50448; File No. SR-PCX-2004-43]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by Pacific Exchange, Inc. Relating to Proposed Listing Fee Schedule for Structured Products

September 24, 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 May 11, 2004 the Pacific Exchange, Inc. ("PCX" or "Exchange"), through its subsidiary, PCX Equities, 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 PCXE. On August 9, 2004, the Commission received Amendment No. 1 to the proposed rule change.<sup>3</sup> On August 23, 2004, the Commission received Amendment No. 2 to the proposed rule change.<sup>4</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 the Substance of the Proposed Rule Change

The PCX is proposing to amend its Schedule of Fees and Charges ("Schedule") in order to adopt new listing fees for listing structured products on the PCXE and traded on the Archipelago Exchange ("ArcaEx"), a facility of the PCXE. The PCX proposes to implement these fees retroactive for listings and listing applications pending as of April 1, 2004. The PCX also proposes to add a definition of structured product in PCXE Rule 5.1(b)17. The text of the proposed rule change is available at the Office of the Secretary of 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, 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 PCX, through its wholly owned subsidiary, PCXE, proposes to adopt new listing fees specifically for structured products listed on the PCXE and traded on ArcaEx.<sup>5</sup> The proposed fees include a non-refundable application processing fee, a one-time initial listing fee, and an annual maintenance fee based on the number of products listed with PCXE.<sup>6</sup>

<sup>5</sup> Structured products are derived from and/or based on a single security or securities, a basket of stocks, an index, a commodity, debt issuance and/or a foreign currency, among other things. Structured products include index and equity linked notes, term notes and units comprised of equity and/or debt securities.

<sup>6</sup> The remaining portions of the current listing fees (Company Name Change Fee, Change in Par Value Fee, Substitute Initial Listing Fee, and Additional Shares Listing Fee) will continue to apply to structured products. Telephone conversation between Leah Mesfin, Special Counsel, Division, Commission, and Tania J. Blanford, Staff Attorney, Regulatory Policy, PCX, on September 16, 2004.

The PCX believes there are several reasons to adopt a fee schedule specifically for structured products. First, PCXE's current listing fees do not explicitly provide for fees to list these types of securities. Accordingly, the amended Schedule would provide guidance and clarity to issuers and the public regarding the applicable fees. Second, in many cases, depending on the number of products listed, the proposed listing fees would substantially reduce the fees paid by issuers of structured products, enabling ArcaEx to compete more effectively for listings with other marketplaces.<sup>7</sup>

##### Summary of Current and Proposed Fee Changes

###### (a) Application Processing Fees

Currently, issuers are charged a \$500 application processing fee. This fee is non-refundable, although upon approval for listing, it is credited towards the initial listing fee. PCX proposes to retain an application processing fee, but proposes to charge either \$500 or the initial listing fee, whichever is less.

###### (b) Initial Listing Fees

Currently, the general one-time initial listing fees are based on whether the issue is also listed on the New York Stock Exchange, American Stock Exchange, or Nasdaq National Market. If an issue is dually listed, the initial listing fee is \$10,000 per product; otherwise, the initial listing fee is \$20,000 per product. These fees apply to each product listed, regardless of the number of products listed by the issuer.

PCX proposes to adopt a one-time initial listing fee for structured products as follows: For the first initial public offering, the initial listing fee would be fixed at \$20,000. For subsequent initial public offerings of structured products from the same issuer, the initial listing fee would be \$1,000 for each additional listed issue, regardless of the number of products listed or if prior products remained listed. For structured products which are already listed on another exchange or marketplace, or are quoted on an inter-dealer quotation system, PCX proposes a fixed initial listing fee of \$5,000 for the first structured product listed by the issuer. For subsequent structured products listed by the same issuer that are already listed on another exchange or marketplace, or are quoted on an inter-dealer quotation system, PCX proposes to base the listing fee on

<sup>7</sup> In addition to the described substantive changes, the Exchange also proposes to replace the "\*" used reference the footnotes in the Schedule of Fees and Charges with sequential numbers for clarity.

<sup>4</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 letter from Tania Blanford, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated August 5, 2004 ("Amendment No. 1"). Amendment No. 1 replaced and superseded the original filing in its entirety. In Amendment No. 1, PCX added a definition of "structured products" to the proposal and made other clarifying changes.

<sup>4</sup> See letter from Tania Blanford, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division, Commission, dated August 20, 2004 ("Amendment No. 2"). In Amendment No. 2, made a minor typographical correction to its proposed rule text.