

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 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. 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 e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2004-70 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-2004-70. 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, 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 such filing will also be available for inspection and copying at the principal office of the NYSE. All comments received will be posted 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-2004-70 and should be submitted on or before February 18, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁶

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51051; File No. SR-PCX-2004-58]

Self-Regulatory Organizations; the Pacific Exchange, Inc.; Order Approving Proposed Rule Change and Amendment No. 2 Thereto by the Pacific Exchange, Inc., Relating to the Exchange's Rules Under Its Minor Rule Plan and Recommended Fine Schedule

January 18, 2005.

On December 2, 2004, 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")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend PCX Rule 10.12 to add new provisions (h)(45) and (k)(i)45. These provisions amend the PCX Minor Rule Plan ("MRP") and Recommended Fine Schedule ("RFS") to add the failure to maintain adequate procedures and controls to monitor and supervise the entry of electronic orders by Users³ to prevent the prohibited practices set

forth in PCX Rules 6.87(d) and 6.90(e).⁴ The proposed rule change was published for comment in the **Federal Register** on December 17, 2004.⁵ On January 3, 2005, PCX filed Amendment No. 1 to the proposal. On January 4, 2005, PCX withdrew Amendment No. 1 and filed Amendment No. 2 to the proposal.⁶ The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

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 exchange,⁷ and, in particular, the requirements of section 6(b)(5) of the Act,⁸ in that it is designed to promote just and equitable principles of trade, facilitate transactions in securities, 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. The Commission also finds that the proposal is consistent with section 6(b)(6) of the Act,⁹ which requires that members and persons associated with members be appropriately disciplined for violations of Exchange rules, and section 6(b)(7) of the Act,¹⁰ which requires that members and persons associated with members are provided a fair procedure for disciplinary procedure.

In approving this proposal, the Commission in no way minimizes the importance of compliance with these rules, and all other rules subject to the imposition of fines under the MRP. The Commission believes that the violation of any self-regulatory organization's rules, as well as Commission rules, is a serious matter. However, in an effort to provide the Exchange with greater flexibility in addressing certain violations, the MRP provides a reasonable means to address rule violations that do not rise to the level of requiring formal disciplinary

⁴ PCX Rules 6.87(c)(4) and 6.90(d)(3) require Order Entry Firms to maintain such controls and procedures.

⁵ See Securities Exchange Act Release No. 50830 (December 9, 2004), 69 FR 75581 (December 17, 2004) ("Notice").

⁶ In Amendment No. 2, PCX proposes to correct a typographical error in the proposed rule text by changing footnote 1 to tie to PCX Rule 10.12(k)(i) instead of to PCX Rule 10.12(k). Amendment No. 2 is a technical amendment, and, therefore, not subject to notice and comment.

⁷ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁸ 15 U.S.C. 78f(b)(5).

⁹ 15 U.S.C. 78f(b)(6).

¹⁰ 15 U.S.C. 78f(b)(7).

⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Pursuant to PCX Rule 6.87(a)(2), "User" means any person or firm that obtains electronic access to Auto-Ex (defined in PCX Rule 6.87(a)(1)) through an Order Entry Firm (defined in PCX Rule 6.87(a)(3)). Pursuant to PCX Rule 6.90(c)(1), "User" means any person or broker-dealer that obtains electronic access to PCX Plus (defined in PCX Rule 6.90(a)) through an Order Entry Firm (defined in PCX Rule 6.90(c)(2)).

proceedings. The Commission notes, however, that after the first failure by an Order Entry Firm to maintain adequate controls and procedures to monitor and supervise the entry of electronic orders pursuant to PCX Rules 6.87(c)(4) and 6.90(d)(3), the Exchange will treat subsequent violations as a formal disciplinary matter.¹¹ The Commission expects that the Exchange will continue to conduct surveillance with due diligence, and make a determination based on its findings as to whether fines of more or less than the recommended amount are appropriate for violations of rules under the MRP on a case-by-case basis, or if a violation requires formal disciplinary action.

It is therefore ordered, pursuant to section 19(b)(2) of the Act¹², that the proposed rule change, including Amendment No.2 thereto (File No. SR-PCX-2004-58) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51053; File No. SR-PCX-2005-03]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc., Relating to Exchange Fees and Charges

January 18, 2005.

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 January 11, 2005, 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 PCX. 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,³ and Rule

19b-4(f)(2) thereunder,⁴ 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 PCX is proposing to amend its Schedule of Fees and Charges For Exchange Services ("Schedule") in order to add provisions for the handling of options on the Standard and Poor's Depository Receipts (ticker symbol "SPY") under the Exchange's marketing fee program. The text of the proposed rule change is available on the PCX's Web site (<http://www.pacificex.com>), at the PCX's Office of the Secretary, and at the Commission's Public Reference Room.

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 PCX included statements concerning the purpose of and basis for its proposal and discussed any comments it had received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The 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 states that the purpose of the proposed filing is to amend the Schedule in order to add provisions for the handling of SPY options under the Exchange's marketing fee program. The Exchange proposes to collect a \$1.00 per contract marketing fee for SPY options and assess this fee on all transactions except for Market Maker to Market Maker transactions. In addition, the Exchange is proposing to exclude trades of SPY options from the existing cap on marketing fees. The PCX states that this charge is necessary as a result of the costs associated with trading SPY options. The Exchange believes that capping marketing fees at \$200 per trade would put it at a competitive disadvantage to other exchanges that trade SPY options.

The Exchange has also proposed to revise the Schedule to show the change

in the symbol of the Nasdaq-100 Tracking Stock Options from QQQ to QQQQ.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act⁵ in general, and furthers the objectives of section 6(b)(4) of the Act⁶ in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities for trading option contracts.⁷

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 PCX neither solicited nor received written comments with respect to the proposed rule change.

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

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to section 19(b)(3)(A)(ii) of the Act⁸ and subparagraph (f)(2) of Rule 19b-4 thereunder.⁹ Accordingly, the proposal will take effect upon filing with the Commission. 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.

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. Comments may be submitted by any of the following methods:

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(4).

⁷ Telephone conversation between Steven Matlin, Senior Counsel, PCX, and Davis Liu, Attorney, Division of Market Regulation, Commission, on January 14, 2005.

⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

⁹ 17 CFR 240.19b-4(f)(2).

¹¹ See proposed PCX Rule 10.12(k)(i)45. See also Notice, *supra* note 5.

¹² 15 U.S.C. 78s(b)(2).

¹³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).