

**Transaction Fee Cap:** The Fee Schedule provides for a cap on transaction fees associated with certain market maker and floor broker agency executions. The cap is available to order-sending firms that execute a specified number of orders on the Exchange per day. The Exchange is amending the Fee Schedule to clarify that this transaction fee cap is not applicable to orders that are routed to a CHX floor broker by means other than the Exchange's automated MAX<sup>®</sup> system. The Exchange believes that this limitation of the fee cap is amply warranted, because a CHX floor broker may be required to expend considerably more time and effort to execute an agency order that is received telephonically, physically, or through means other than the MAX system.

**Specialist Fixed Fee:** Section E of The Fee Schedule was recently amended, in the case of fixed fees for firms trading NASDAQ/NM Securities, to eliminate fixed fee calculations that are contingent upon the definition of "Exemption Eligible Security" that is set forth in Section D of the Fee Schedule.<sup>7</sup> Accordingly, the Exchange is further modifying Section E to clarify that the exemption for Exemption Eligible Securities now applies only to Tape B issues (*i.e.*, issues that are listed on a stock exchange other than the New York Stock Exchange).

Finally, the Exchange is amending Section F of the Fee Schedule to eliminate an obsolete reference to transactions that take place "during the E-Session." The Exchange terminated its E-Session program several years ago, rendering this reference obsolete.

## 2. Statutory Basis

The CHX believes that the proposed rule change is consistent with Section 6 of the Act,<sup>8</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act,<sup>9</sup> in particular, in that it provides for the

Information Services department that they are terminating their CHX e-mail account. This may occur when the user leaves the CHX floor or establishes an alternative e-mail account. All users are required to submit such documentation when they terminate their CHX e-mail account. An account may only become active again if a written request is submitted to the CHX Information Services department, together with the user's written acknowledgement of CHX policies and procedures relating to the use of electronic mail.

<sup>7</sup> See Securities Exchange Act Release No. 34-50616 (November 1, 2004), 69 FR 64608 (November 5, 2004) (SR-CHX-2004-22). This rule change instituted a pro-rata fee calculation, and eliminated a volume-driven definition, in the case of Nasdaq/NM securities. Accordingly, the definition of Exemption Eligible Securities for Nasdaq/NM securities is no longer applicable when calculating the fixed fee for Nasdaq/NM specialists.

<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> 15 U.S.C. 78f(b)(4).

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 inappropriate burden on competition.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

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

The foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange and therefore has become effective pursuant to section 19(b)(3)(A) of the Act<sup>10</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder.<sup>11</sup> At any time within 60 days of the filing of such 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 purpose of the Act.<sup>12</sup>

## 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 an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CHX-2005-02 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-CHX-2005-02. This file

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(2).

<sup>12</sup> For purposes of calculating the 60-day abrogation period, the Commission considers the proposal to have been filed on February 11, 2005, the date the CHX filed Amendment No. 2. See Rule 19b-4(f)(6).

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 also will be available for inspection and copying at the principal office of the CHX. 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-CHX-2005-02 and should be submitted on or before March 11, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51197; File No. SR-NASD-2005-003]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change To Amend Rule 4350(n) and IM-4350-7 To Conform the Time Frame for the Disclosure of a Waiver to a Company's Code of Conduct to the Time Frame Required for Similar Disclosure by the Commission's Form 8-K

February 14, 2005.

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 January 12, 2005, the National Association of

<sup>13</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.

Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), 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 Nasdaq. 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 the Substance of the Proposed Rule Change**

Nasdaq proposes to modify Rule 4350 and related interpretative material to conform the time frame for the disclosure of a waiver to a company's code of conduct to the time frame required for similar disclosure by the Commission's Form 8-K. Nasdaq will implement the proposed rule change immediately upon approval by the Commission. The text of the proposed rule change is available on Nasdaq's Web site (<http://www.nasdaq.com>), at the principal office of the NASD, 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, Nasdaq 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. Nasdaq 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**

NASD Rule 4350(n) requires each Nasdaq-listed issuer to adopt a code of conduct applicable to all directors, officers and employees of the issuer. This rule also requires that any waivers of the code for directors or executive officers must be approved by the issuer's board of directors and that issuers (other than foreign private issuers) must disclose such waivers in a Form 8-K within five business days.

Similarly, Item 406 of Regulations S-K and S-B<sup>3</sup> require an issuer to disclose whether the issuer has adopted a code of ethics that applies to its principal

executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. The Commission also requires an issuer to disclose waivers of the code that are granted to those individuals. Recent amendments to Form 8-K shorten the time frame for this disclosure from five business days to four business days.<sup>4</sup>

To conform with these Commission changes, Nasdaq proposes to modify the existing five business-day period for disclosure in its rules to instead require such disclosure within four business days of the granting of a waiver to the code of conduct to any executive officer or director.<sup>5</sup>

##### **2. Statutory Basis**

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>6</sup> in general and with Section 15A(b)(6) of the Act,<sup>7</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change is consistent with these requirements in that it is designed to enhance the disclosure required by issuers and align that disclosure with the time frames required by the Commission for similar disclosures, thereby reducing confusion among issuers and investors.

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

Nasdaq 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.

<sup>4</sup> Securities Act Release No. 8400 (March 16, 2004), 69 FR 15594 (March 25, 2004). These amendments were effective August 23, 2004.

<sup>5</sup> Foreign private issuers will continue to be permitted to make such disclosure either on the issuer's next Form 20-F or 40-F, or on a Form 6-K, consistent with the Commission's requirements. See Securities Act Release No. 8177, 68 FR 5110 (Jan. 31, 2003) (adopting new Item 16B to Form 20-F and paragraph (9) to General Instruction B of Form 40-F regarding disclosure by foreign private issuers of waivers to the code of conduct). See also Securities Exchange Act Release No. 50573 (Oct. 20, 2004), 69 FR 62493 (Oct. 26, 2004) (adopting conforming changes to NASD Rule 4350(n) and IM-4350-7).

<sup>6</sup> 15 U.S.C. 78o-3.

<sup>7</sup> 15 U.S.C. 78o-3(b)(6).

#### **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.

### **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 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, as amended, 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-NASD-2005-003 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-NASD-2005-003. 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

<sup>3</sup> 17 CFR 229.406(a) and 228.406(a).

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 also will be available for inspection and copying at the principal office of the NASD. 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-NASD-2005-003 and should be submitted on or before March 11, 2005.

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. 34-51195; File No. SR-PCX-2005-12]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. Relating to Exchange Fees and Charges

February 11, 2005.

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 January 28, 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 PCX. PCX submitted Amendment No. 1 to the proposal on February 11, 2005.<sup>3</sup> The Exchange filed this proposal pursuant to Section 19(b)(3)(A) of the

Act,<sup>4</sup> and Rule 19b-4(f)(2) thereunder,<sup>5</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, as amended, from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

PCX proposes to amend its Schedule of Fees and Charges in order to modify the fee that applies to each OTP Holder that access the Exchange's server capacity to use the Actant quoting software employed in PCX Plus, and to amend the provisions for the handling of options on the QQQQ under the Exchange's marketing fee program. The text of the proposed rule change is available on PCX's Web site (<http://www.pacificex.com>), at 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, 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, as amended. 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

###### Actant Quoting Software

The purpose of this proposed rule change is to modify the fee for those OTP Holders that wish to access the Exchange's server capacity to use the Actant quoting software employed in PCX Plus. Actant is a third-party vendor with whom the Exchange has contracted to provide quoting software to be employed in PCX Plus. Since, according to PCX, it would be prohibitively expensive for small OTP Holders to purchase their own servers, the Exchange will create a server bank from which each OTP Holder could lease capacity. This would facilitate participation on PCX Plus by smaller

OTP Holders that might not have the expertise, capital, or staff to acquire and maintain the servers needed to support the quoting software. The Exchange currently charges \$100 per month to each OTP Holder who accesses the Exchange's server capacity in order to use the Actant software.

The Exchange is proposing to modify the current fee from \$100 per month for each OTP Holder who accesses the Exchange's server capacity in order to use the Actant software to \$100 per month for each ten option issues an OTP Holder quotes through the Exchange's server capacity to use the Actant quoting software. The Exchange notes that it will not prorate the fee should an OTP Holder quote less than its full allotment of ten options issues. For purposes of billing, the Exchange will round up to the next multiple of ten to determine an OTP Holder's fee for a particular month. Under the proposed fee structure, an OTP Holder quoting 8 issues during a month would be charged \$100, an OTP Holder quoting 32 issues would be charged \$400 a month, and an OTP Holder quoting 115 issues would be charged \$1,200 a month. The Exchange represents that the change is necessary because the costs associated with providing the server bank to use Actant software are directly related to the number of issues being quoted, not the number of users.

###### QQQQ

The Exchange is proposing to amend its Schedule of Fees and Charges in order to modify the provisions for the handling of options on QQQQ under the Exchange's marketing fee program. The Exchange is currently imposing a \$1.00 per contract marketing fee for the QQQQ options. The Exchange makes the funds available to Lead Market Makers ("LMMs") for their use in attracting orders. The Exchange does not retain any of the money collected as marketing fees. Any fees collected that are not used by the LMMs are rebated to the market makers. In addition, the Exchange currently incurs a Royalty Fee of \$0.10 for every QQQQ option traded at PCX. At this time the Exchange is absorbing 100% of the cost for the Royalty Fee. To help offset some of the costs incurred by the Exchange without adding additional costs to PCX Market Makers, the Exchange proposes to impose a \$0.95 per contract marketing fee for the QQQQ options and a \$0.05 per contract Royalty Fee for QQQQ options. Under this proposal, the Exchange will retain the \$0.05 per contract Royalty Fee for QQQQ options as a means to help pay for the \$0.10 Royalty Fee incurred on each QQQQ

<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> In Amendment No. 1, the Exchange clarified that it will round up to the next multiple of ten to determine an OTP Holder's fee to access the Actant quoting software for a particular month should an OTP Holder quote less than its full allotment of ten options issues. The Exchange also clarified that it proposes to impose a \$0.95 per contract marketing fee for the Nasdaq-100 Tracking Stock ("QQQQ") options, a \$0.05 per contract Royalty Fee for QQQQ options, and will retain the \$0.05 per contract Royalty Fee for QQQQ options as a means to help pay for the \$0.10 Royalty Fee incurred by the Exchange on each QQQQ options traded at PCX.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>5</sup> 17 CFR 240.19b-4(f)(2).