

Nasdaq has requested that the Commission waive the five-day notice requirement and 30-day operative delay period so that the proposed rule change will be immediately operative. The Commission notes that the proposed rule change will not introduce any new changes to the current level of access to Nasdaq's Brut Facility, but will merely extend the access that is currently available to non-NASD members through Brut for an additional five months. The Commission also notes that the current rule granting non-NASD members access to Nasdaq's Brut Facility expires on July 31, 2005. Therefore, the Commission has determined to waive the five-day notice requirement and 30-day operative delay because such waiver will enable Nasdaq to implement the rule immediately and avoid any lapse in Brut access for non-NASD members.<sup>8</sup>

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:

##### 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-2005-088 on the subject line.

##### Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-NASD-2005-088. 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 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-2005-088 and should be submitted on or before August 22, 2005.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52109; File No. SR-PCX-2005-72]

#### Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Q Orders

July 22, 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 June 7, 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 and II below, which items have been prepared by the Exchange. On July 6, 2005, the Exchange amended the proposed rule change ("Amendment No. 1").<sup>3</sup> The

Exchange has designated the proposed rule change as "non-controversial" under section 19(b)(3)(A) of the Act<sup>4</sup> and Rule 19b-4(f)(6) thereunder,<sup>5</sup> which renders the proposed rule change 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, through its wholly owned subsidiary PCX Equities, Inc. ("PCXE"), proposes to amend its rules governing the Archipelago Exchange ("ArcaEx"), the equities trading facility of PCXE. With this filing, the Exchange proposes to modify its Q Order definition. The text of the proposed rule change is set forth below. Proposed new language is in *italics*; proposed deletions are in [brackets].

\* \* \* \* \*

#### Rule 7

##### Equities Trading

##### Orders and Modifiers

Rule 7.31 (a)-(j)—No Change.

(k) Q Order

(1) A Q Order is a limit order submitted to the Archipelago Exchange by a Market Maker.

(A) A Market Maker may instruct the Archipelago Exchange before 6:28 a.m. (Pacific Time) to enter a Q Order on their behalf as follows:

(1) At the last price and size entered by the Market Maker during the previous trading day, either including or excluding reserve size;

(2) At a specified percentage from the best bid or offer;

(3) At the standard Q defined as \$0.01 bid and 2 times the previous day's close for the offer with specified display and reserve sizes.

Upon execution, the Q Order entered pursuant to the above instructions will automatically repost with the original size and \$10 below the original bid or \$10 above the original offer, but never below \$0.01.

Rule 7.31(k)(2)-(h)(h)—No Change.

\* \* \* \* \*

proposed rule change is June 7, 2005, and the effective date of the amendment is July 6, 2005. For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change, as amended, under section 19(b)(3)(C) of the Act, the Commission considers the period to commence on July 6, 2005, the date on which the PCX submitted Amendment No. 1. See 15 U.S.C. 78s(b)(3)(C).

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

<sup>5</sup> 17 CFR 240.19b-4(f)(6).

<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 inserted the Statutory Basis section, which had been inadvertently omitted, and corrected the language set forth in Item III. The effective date of the original

<sup>8</sup> For purposes only of waiving the 30-day operative delay only, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

## 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 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 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

As part of its continuing efforts to enhance participation on the ArcaEx facility, the PCX is proposing to modify its Q Order definition. In particular, the Exchange seeks to provide Market Makers with the option to instruct ArcaEx to submit a Q Order on their behalf.

Currently, PCXE Rule 7.31(k) describes Q Orders as a limit order submitted to the Exchange by a Market Maker. As part of their Market Maker obligations, pursuant to PCXE Rule 7.23, Market Makers are required to maintain continuous, two-sided Q Orders in the securities in which the Market Maker is registered to trade. In order to assist the Market Makers with this obligation, the Exchange proposes to offer functionality in which the Market Makers could choose to have the Exchange enter and maintain a Q Order on their behalf. At 6:28 a.m. Pacific time, the Exchange would extract information submitted by the Market Maker that provides specific quote instructions for the Exchange to enter a quote on the Market Maker's behalf. Specifically, the Market Maker would instruct ArcaEx to enter a Q Order based on one of the following options:

- (1) At the last price and size entered by the Market Maker during the previous trading day, either including or excluding reserve size;
- (2) At a specified percentage from the best bid or offer; or
- (3) At the standard Q defined as \$0.01 bid and 2 times the previous day's close for the offer with specified display and reserve sizes.

Conversely, the Market Maker could choose to enter their own Q Order, or request that their previous day's Q Order be canceled. In addition, upon execution of the Q Order that was entered according to one of the

aforementioned options, the Exchange would automatically repost the Q Order with the original size and \$10 below the original bid or above the original offer, but never below \$0.01. Lastly, in an instance of a bulk cancel, the Exchange would not automatically cancel Q orders.

The proposed rule change would be similar to Nasdaq Stock Market rules that were recently published in the **Federal Register** for immediate effectiveness.<sup>6</sup> In particular, Nasdaq proposed functionality for Nasdaq Quoting Market Participants to instruct Nasdaq to open their quotes based on a variety of choices.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,<sup>7</sup> in general, and furthers the objectives of section 6(b)(5) of the Act,<sup>8</sup> in particular, in that it is designed to facilitate transactions in securities, to promote just and equitable principles of trade, to enhance competition and 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 will impose any inappropriate 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 on the proposed rule change were neither solicited nor received.

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

Because the foregoing proposed rule change does not:

- (i) Significantly affect the protection of investors or the public interest;
- (ii) Impose any significant burden on competition; and
- (iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to section 19(b)(3)(A) of the

Act<sup>9</sup> and Rule 19b-4(f)(6) thereunder.<sup>10</sup> The PCX has requested that the Commission waive the 30-day operative delay for "non-controversial" proposals because the proposed rule change is similar to rules in effect on the Nasdaq Stock Market. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the proposal would allow the PCX to offer market makers a means by which to manage their Q Orders. In addition, the proposal would introduce a functionality that is similar to one in effect on The Nasdaq Stock Market. For this reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>11</sup>

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:

### 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-PCX-2005-72 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9309.

All submissions should refer to File Number SR-PCX-2005-72. This file number should be included on the subject line if e-mail is used. To help the

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(6). The Commission notes that PCX provided written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change at least five business days prior to the date of filing of the proposed rule change.

<sup>11</sup> For purposes only of waiving the 30-day operative delay of the proposed rule change, the Commission considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>6</sup> See Securities Exchange Act Release No. 51522 (April 11, 2005), 70 FR 20955 (April 22, 2005) (SR-NASD-2005-050).

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

<sup>8</sup> 15 U.S.C. 78f(b)(5).

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 office of the PCX. 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-PCX-2005-72 and should be submitted on or before August 22, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52114; File No. SR-Phlx-2005-44]

### Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to Payment for Order Flow Program

July 22, 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 July 1, 2005, the Philadelphia Stock Exchange, Inc. ("Phlx" 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 July 20, 2005, the Phlx submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> On July 21, 2005, the Phlx submitted Amendment No. 2 to the proposed rule change.<sup>4</sup> The Phlx has designated this proposal as one changing a fee imposed by the Phlx under Section 19(b)(3)(A)(ii) of the Act<sup>5</sup> and Rule 19b-4(f)(2) thereunder,<sup>6</sup> which renders the proposal, as amended, 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

The Phlx proposes to amend its equity options payment for order flow program as follows: (1) A payment for order flow fee will be assessed only on electronically delivered orders, thus payment for order flow fees will not be assessed on non-electronically delivered orders, *i.e.*, floor brokered orders; (2) payment for order flow fees will increase from \$0.40 to \$0.60 per contract for all options other than Nasdaq-100 Index Tracking Stock<sup>SM</sup> traded under the symbol QQQQ ("QQQQ"),<sup>7</sup> and iShares FTSE/Xinhua China Index Fund ("FXI Options"), an exchange-traded fund; (3) the payment for order flow fee will decrease from \$1.00 to \$0.75 for options on QQQQ; (4) Directed ROTs may elect to be assessed or not to be assessed a payment for order flow fee for orders directed to them; and (5) Directed ROTs will no

<sup>3</sup> In Amendment No. 1, the Exchange: (1) Revised the proposed rule text to clarify the provision on the return of any excess payment for order flow funds that are billed but not reimbursed to specialists; (2) revised the purpose section to clarify that Directed Registered Options Traders ("Directed ROTs") may elect to be assessed or not to be assessed a payment for order flow fee and to clarify the example of how payment for order flow reimbursement is calculated; and (3) made several technical corrections to the proposed rule change.

<sup>4</sup> In Amendment No. 2, the Exchange made a technical correction to the proposed rule text.

<sup>5</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>6</sup> 17 CFR 240.19b-4(f)(2).

<sup>7</sup> The Nasdaq-100<sup>®</sup>, Nasdaq-100 Index<sup>®</sup>, Nasdaq<sup>®</sup>, The Nasdaq Stock Market<sup>®</sup>, Nasdaq-100 Shares<sup>SM</sup>, Nasdaq-100 Trust<sup>SM</sup>, Nasdaq-100 Index Tracking Stocks<sup>SM</sup>, and QQQ<sup>SM</sup> are trademarks or service marks of The Nasdaq Stock Market, Inc. ("Nasdaq") and have been licensed for use for certain purposes by the Philadelphia Stock Exchange pursuant to a License Agreement with Nasdaq. The Nasdaq-100 Index<sup>®</sup> ("Index") is determined, composed, and calculated by Nasdaq without regard to the Licensee, the Nasdaq-100 Trust<sup>SM</sup>, or the beneficial owners of Nasdaq-100 Shares<sup>SM</sup>. The Exchange states that Nasdaq has complete control and sole discretion in determining, comprising, or calculating the Index or in modifying in any way its method for determining, comprising, or calculating the Index in the future.

longer be able to request reimbursement for payment for order flow paid to order flow providers.

#### Equity Options Payment for Order Flow Program in Effect Beginning June 2, 2005<sup>8</sup>

Beginning June 2, 2005, the Exchange established a payment for order flow program to take into account Directed Orders<sup>9</sup> pursuant to new Exchange Rule 1080(l).<sup>10</sup> Pursuant to Exchange Rule 1080(l), Exchange specialists,<sup>11</sup> SQTs<sup>12</sup> and RSQTs<sup>13</sup> trading on the Exchange's electronic options trading platform, Phlx XL,<sup>14</sup> may receive Directed Orders from Order Flow Providers.<sup>15</sup>

<sup>8</sup> On June 2, 2005, the Exchange filed to amend its payment for order flow program effective as a pilot program for trades involving payment for order flow and Directed ROTs settling on or after June 2, 2005 through May 27, 2006. See Securities Exchange Act Release No. 51909 (June 22, 2005), 70 FR 37484 (June 29, 2005) (SR-Phlx-2005-37). Although the Commission subsequently abrogated SR-Phlx-2005-37 on July 7, 2005, it was in effect until the filing of the current proposal, SR-Phlx-2005-44, on July 1, 2005. See Securities Exchange Act Release No. 51984 (July 7, 2005), 70 FR 40413 (July 13, 2005).

<sup>9</sup> The term "Directed Order" means any customer order to buy or sell which has been directed to a particular specialist, Remote Streaming Quote Trader ("RSQT") (as defined below), or Streaming Quote Trader ("SQT") (defined below) by an Order Flow Provider (as defined below). The provisions of Exchange Rule 1080(l) are in effect for a one-year pilot period to expire on May 27, 2006. See Securities Exchange Act Release No. 51759 (May 27, 2005), 70 FR 32860 (June 6, 2005) (SR-Phlx-2004-91).

<sup>10</sup> See Securities Exchange Act Release No. 51909 (June 22, 2005), 70 FR 37484 (June 29, 2005) (SR-Phlx-2005-37).

<sup>11</sup> The Exchange uses the terms "specialist" and "specialist unit" interchangeably herein.

<sup>12</sup> An SQT is an Exchange Registered Options Trader ("ROT") who has received permission from the Exchange to generate and submit option quotations electronically through an electronic interface with AUTOM via an Exchange approved proprietary electronic quoting device in eligible options to which such SQT is assigned. AUTOM is the Exchange's electronic order delivery, routing, execution and reporting system, which provides for the automatic entry and routing of equity option and index option orders to the Exchange trading floor. See Exchange Rules 1014(b)(ii) and 1080.

<sup>13</sup> An RSQT is an Exchange ROT that is a member or member organization of the Exchange with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically through AUTOM in eligible options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange. An RSQT may only trade in a market making capacity in classes of options in which he is assigned. See Exchange Rule 1014(b)(ii)(B). See Securities Exchange Act Release Nos. 51126 (February 2, 2005), 70 FR 6915 (February 9, 2005) (SR-Phlx-2004-90) and 51428 (March 24, 2005), 70 FR 16325 (March 30, 2005) (SR-Phlx-2005-12).

<sup>14</sup> In July 2004, the Exchange began trading equity options on Phlx XL, followed by index options in December 2004. See Securities Exchange Act Release No. 50100 (July 27, 2004), 69 FR 46612 (August 3, 2004) (SR-Phlx-2003-59).

<sup>15</sup> The term "Order Flow Provider" means any member or member organization that submits, as

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

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

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