

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-48351; File No. SR-PCX-2003-34)

August 15, 2003

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Pacific Exchange, Inc., and Amendment No. 1 Thereto, Relating to its Arbitration Program

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 July 9, 2003, the Pacific Exchange, Inc. (“PCX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission” or “SEC”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. On August 13, 2003, the Exchange filed Amendment No.1 to the proposed rule change.³ The Commission received one comment letter regarding the proposed rule change in anticipation of its filing.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. For the reasons described below, the Commission is granting accelerated approval to the proposed rule change.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Kathryn Beck, Senior Vice President, General Counsel, Chief Regulatory Officer and Corporate Secretary, PCX, to Florence Harmon, Senior Special Counsel, Division of Market Regulation, Commission, dated August 12, 2003. In Amendment No. 1, PCX altered its description of the proposed rule change to reflect that a failure to execute required waivers by an industry party to arbitration would be referred for disciplinary action.

⁴ See letter to the Secretary, SEC, from Raghavan Sathianathan, dated July 2, 2003. The commenter expressed concerns regarding PCX’s administration of an arbitration in which he was a co-respondent, alleging that PCX did not follow its arbitration rules. The commenter asserted that the PCX had lost its right to make rule changes based on its administration of his arbitration. PCX submitted a letter in response in which it asserted that the commenter’s case had been administered properly and in accordance with its rules. PCX also asserted that the proposed rule change reflects PCX’s desire to provide an arbitration forum with a reduced risk of subsequent legal exposure to the organization. See letter dated July 30, 2003 from Kathryn Beck, Senior Vice President, PCX, to Florence Harmon, Senior Special Counsel, Division of Market Regulation, SEC.

PCX, on its own behalf and through its wholly-owned subsidiary PCX Equities, Inc. (“PCXE), pursuant to delegated authority, is proposing to amend the PCX and PCXE arbitration rules. The proposed rule change will expand the applicability of the waiver requirements imposed in SR-PCX-2003-13⁵ from certain pending PCX arbitrations to all PCX and PCXE arbitrations. Specifically, the proposed rule changes would require all parties to an arbitration filed pursuant to PCX or PCXE Rule 12 (other than those described below) to waive (1) the application of the California Rules of Court, Division VI of the Appendix, entitled “Ethics Standards of Neutral Arbitrations in Contractual Arbitration” (the “California Standards”), and (2) any claims against the PCX or PCXE that the conduct of the arbitration violates the California Code of Civil Procedure Section 1281.92 (“CCCP Claims”). However, the parties would not be required to waive the CCCP claims in arbitrations solely between or among members, member organizations and persons associated therewith (or, as the case may be, solely between ETP Holders and persons associated therewith) that do not involve consumer-related or employment-related claims.⁶ Both waivers (where required) must be made without condition and in the form required by the PCX and PCXE.⁷ If any party to an arbitration fails to sign the required waivers, the PCX will decline jurisdiction over, dismiss and refund fees paid to PCX or PCXE by the parties for, that arbitration. Furthermore, it will be considered conduct inconsistent with just and equitable principles of trade for any member, member organization,

⁵ See Securities Exchange Act Release No. 47734 (April 24, 2003), 68 FR 23351 (May 1, 2003).

⁶ PCX and PCXE believe that such arbitrations would not be considered “consumer arbitrations” as that term is used in the California Code of Civil Procedure.

⁷ Copies of the prescribed waiver forms were filed as Exhibits A and B to the proposed rule change. These are the same as the waiver forms that were attached to rule filings previously approved by the Commission. See Securities Exchange Act Release No. 46881 (November 21, 2002), 67 FR 71224 (November 29, 2002) (waiver of California Standards); Securities Exchange Act Release No. 47734 (April 24, 2003), 68 FR 23351 (May 1, 2003) (waiver of CCCP Claims).

ETP Holder or associated person therewith who is a party to a PCX or PCXE arbitration to fail to waive the California Standards and the CCCP Claims, where required.

Below is the text of the proposed rule change. Proposed new language is italicized, deleted text is in [brackets].

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PCX RULE 12

Arbitration

Matters Subject to Arbitration

Rule 12.1(a) - (g) - No change.

Commentary:

.01 No change.

.02 It may be deemed conduct inconsistent with just and equitable principles of trade for a member, a member organization or a person associated with a member or member organization to:

(a) No change.

(b) fail to waive the California Rules of Court, Division VI of the Appendix, entitled “Ethics Standards for Neutral Arbitrators in Contractual Arbitration” (the “California Standards”), if the member, member organization or person associated with a member or member organization is a party to an arbitration filed pursuant to this Rule 12 [if all the parties in the case who are customers have waived application of the California Standards in that case; or to fail to waive the California Standards if all associated persons with a claim alleging employment discrimination, including a sexual harassment

claim, in violation of a statute have waived application of the California Standards in that case];

(c) fail to waive any claims against the Exchange that the conduct of the arbitration violates the California Code of Civil Procedure Section 1281.92 (“CCCP Claims”), if the member, member organization or person associated with a member or member organization is a party to an arbitration filed pursuant to this Rule 12 (other than arbitrations solely between or among members, member organizations and/or persons associated with a member or member organization that do not involve consumer-related or employment-related claims) [if all the parties in the case who are customers have waived the CCCP Claims in that case; or to fail to waive the CCCP Claims if all associated persons with a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute have waived the CCCP Claims in that case];

(d) No change.

(e) No change.

.03 No change.

* * *

Rule 12.35 [Applicability of Arbitration Rules] Waivers

[(a) Reserved.]

[(b) Arbitrations Filed Prior to May 1, 2003. Arbitration claims that were filed prior to May 1, 2003 and remain pending will be administered as follows:]

[(i) The arbitration] Arbitration claims will be administered in accordance with this Rule[s] 12[.1 through 12.34] only [if] :

[(A) arbitrator(s) have been appointed as of May 1, 2003; and]

[(B)] all parties to the arbitration have waived, without condition and in the form required by the Exchange, the application of the California Standards and the CCCP Claims (as defined in Commentary .02 of Rule 12.1); provided, however, that the parties are not required to waive the CCCP claims in arbitrations solely between or among members, member organizations and/or persons associated with a member or member organization that do not involve consumer-related or employment-related claims. PCX will decline jurisdiction over, dismiss and refund fees paid to PCX by the parties for, any arbitration claims in which any of the parties to arbitration fail to sign both waivers, where required.

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PCXE RULE 12

Arbitration

* * *

Rule 12.2(a) - (g) - No change.

(h) It may be deemed conduct inconsistent with just and equitable principles of trade for an ETP Holder or a person associated with an ETP Holder to:

(i) fail to submit to arbitration on demand under the provisions of this Rule[, or];

(ii) to fail to waive the California Rules of Court, Division VI of the Appendix, entitled “Ethics Standards for Neutral Arbitrators in Contractual Arbitration” (the “California Standards”), if the ETP Holder or person associated with an ETP Holder is a party to an arbitration filed pursuant to this Rule 12 [if all

the parties in the case who are customers have waived application of the California Standards in that case; or to fail to waive the California Standards if all associated persons with a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute have waived application of the California Standards in that case]; [or]

(iii) fail to waive any claims against the PCXE that the conduct of the arbitration violates the California Code of Civil Procedure Section 1281.92 (“CCCP Claims”), if the ETP Holder or person associated with an ETP Holder is a party to an arbitration filed pursuant to this Rule 12 (other than arbitrations solely between or among ETP Holders and/or persons associated with an ETP Holder that do not involve consumer-related or employment-related claims);

(iv) to fail to appear or to provide any document in his or her or its possession or control as directed pursuant to the provisions of this Rule; or

(v) to fail to honor an award of arbitrators properly rendered pursuant to the provisions of this Rule where a timely motion has not been made to vacate or modify such award pursuant to applicable law.

(i) - (j) No change.

* * *

Rule 12.35 Waivers

Arbitration claims will be administered in accordance with this Rule 12 provided all parties to the arbitration have waived, without condition and in the form required by the PCXE, the application of the California Standards and the CCCP Claims (as defined in Rule 12.1(h)); provided, however, that the parties are not required to waive the CCCP

claims in arbitrations solely between or among ETP Holders and/or persons associated with an ETP Holder that do not involve consumer-related or employment-related claims. PCXE will decline jurisdiction over, dismiss and refund fees paid to PCXE by the parties for, any arbitration claims in which any of the parties to arbitration fail to sign both waivers, where required.

* * * * *

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.⁸ The text of these statements may be examined at the places specified in Item III 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

PCX states that it makes every effort to serve investors who bring their claims to PCX by providing a fair, efficient, and economical arbitration forum. Recent changes in California law and the attendant litigation, however, have caused PCX to reevaluate how it administers its arbitration programs. Specifically, California recently adopted (1) Section 1281.92 of the California Code of Civil Procedure (“CCCP 1281.92”), which prohibits private arbitration providers from administering arbitrations, or providing any other services related to arbitration, if

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The discussion in this section represents the Exchange’s views on the situation in California and does not in any way represent a Commission position on this issue.

any party or attorney for a party has, or has had within the preceding year, any type of financial interest in the arbitration provider, and (2) the California Standards, which require arbitration providers to implement and maintain substantial new recordkeeping and disclosure requirements. Since their adoption, CCCP 1281.92 and the California Standards have become the subject of controversy or, in some cases, litigation regarding their interpretation and application to arbitration programs administered by self-regulatory organizations.⁹ To minimize any potential financial and litigation risk associated with these new provisions, PCX and PCXE have decided to require parties to PCX and PCXE arbitrations to waive the California Standards and CCCP Claims in order for the arbitrations to continue pursuant to PCX and PCXE Rule 12.

Once this proposed rule filing is effective, PCX and PCXE will notify parties to PCX and PCXE arbitrations of the rule change and provide them with the waiver forms and the opportunity to speak with PCX staff if they desire more information regarding the waivers. Industry parties to the arbitrations will be required to execute the waiver agreements. An industry party's failure to sign the waiver as required by the proposed rule change will be referred for disciplinary action.

2. Statutory Basis

⁹ See, e.g., Brief of the Securities and Exchange Commission, Amicus Curiae, in Support of Plaintiffs' Motion for Declaratory Judgment, NASD Dispute Resolution, Inc. and New York Stock Exchange, Inc., v. Judicial Council of California, C023486 (No. District of California, September 18, 2002) (arguing that the California Standards conflict with, and thus are preempted by, the Commission's regulation of SRO arbitration under the Exchange Act and by the Federal Arbitration Act). The brief is available on the Commission Web site at: www.sec.gov/litigation/briefs/nasddispute.pdf. See also Securities Exchange Act Release No. 46881 (Nov. 21, 2002), 67 FR 71224 (Nov. 29, 2002) (describing the controversy regarding new California arbitration provisions).

PCX believes that this proposal is consistent with Section 6(b) of the Act,¹⁰ in general, and furthers the objectives of Section 6(b)(5),¹¹ which requires 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 foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and, in general, to protect investors and the public interest.

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

PCX 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 on the proposed rule change were neither solicited nor received by PCX. However, the SEC received one comment letter on the proposed rule change.¹²

III. 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. 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

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

¹² See n. 4, supra.

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 PCX. All submissions should refer to File No. SR-PCX-2003-34 and should be submitted by [insert date 21 days from publication].

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change, as Amended

The PCX requests that the Commission find good cause to accelerate effectiveness of this proposed rule change, as amended, pursuant to Section 19(b)(2) of the Act.¹³ After careful review, 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, and, in particular, the requirements of Section 6 of the Act.¹⁴ Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act, which requires that the rules of a national securities exchange be designed to promote just and equitable principles of trade, as well as to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest.¹⁵ The Commission believes that the proposed rules are designed to provide investors with a mechanism to help resolve their disputes with broker-dealers in an expeditious manner, and are designed to help ensure the certainty and finality of arbitration awards. Additionally, the Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of notice thereof in the

¹³ 15 U.S.C. 78s(b)(2).

¹⁴ In approving the proposal, the Commission has considered the rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁵ 15 U.S.C. 78f(b)(5).

Federal Register. Accelerated approval is appropriate in that it will permit the PCX to make its forum for the resolution of such disputes available immediately.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁶ that the proposed rule change (SR-PCX-2003-34), as amended, is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Margaret H. McFarland
Deputy Secretary

¹⁶ 15 U.S.C. 78s(b)(2).

¹⁷ 17 CFR 200.30-3(a)(12).