

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-51076; File No. SR-PCX-2004-125)

January 25, 2005

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the Pacific Exchange, Inc. Relating to Exchange Fees and Charges

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 December 21, 2004, 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 Exchange. On January 12, 2005, the Exchange filed Amendment No. 1 to the proposed rule change. On January 13, 2005, the Exchange filed Amendment No. 2 to the proposed rule change. 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 Exchange proposes to amend its Schedule of Fees and Charges For Exchange Services (“Schedule”) in order to eliminate the Shortfall Fee and corresponding Shortfall Credit and the Designated Options Examining Authority (“DOEA”) fee, add a clarifying change to the \$500 application fee for a request for a waiver pursuant to PCX Rule 2.5(c)(4) and make certain administrative changes. The text of the proposed rule change is available on the Exchange’s Web site ([http://www.pacificex.com/legal/legal\\_pending.html](http://www.pacificex.com/legal/legal_pending.html)), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

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

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

## 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 Exchange 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 Exchange 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 Exchange is proposing to amend its Schedule in order to eliminate the Shortfall Fee, as well as the corresponding Shortfall Credit, and the DOEA fee, add a clarifying change to the \$500 application fee for a request for a waiver pursuant to PCX Rule 2.5(c)(4) and make certain administrative changes.

#### The Shortfall Fee and Credit

The "Shortfall Fee" is a fee that is charged on the volume difference between 12% of the total national market share in an option issue for one month and the percentage executed by the Lead Market Maker ("LMM"). The current Shortfall Fee is \$0.35 per contract. An LMM is currently entitled to a "Shortfall Credit" of \$0.35 per contract for any top 120 equity option issues the LMM trades where the PCX volume in the issue is higher than 12% of the scaled national volume in that issue for that month. The volume base for the Shortfall Credit is the PCX monthly volume for the issue less 12% of the scaled monthly industry volume for each qualifying issue. The Shortfall Credit may be used by an LMM only to offset a Shortfall Fee the

LMM incurs for the same month and may not be used to offset other fees, or be carried forward or applied retroactively to the Shortfall Fee the LMM has incurred or will incur for other months. For the purpose of calculating the Shortfall Fee, the national market share of any equity option industry volume is capped at 2.9 million contracts per day. Shortfall Fee billing commences after an issue completes the first four full months of trading under an LMM.

The Exchange is proposing to eliminate the Shortfall Fee and the corresponding Shortfall Credit in their entirety. The Exchange believes that the elimination of the Shortfall Fee is appropriate in order to make the PCX more competitive and to add liquidity to the marketplace. The Exchange intends to provide all LMMs with a rebate for fees paid in the months of October and November 2004.

#### DOEA Fee

Previously, the PCX contracted with the NASD to conduct all DOEA examinations for the Exchange. The Exchange would pass along the cost of the examination plus 17% to the entity that was examined. NASD has stopped providing this service to the Exchange, and the Exchange no longer monitors any firms that require DOEA examinations. Accordingly, the Exchange is proposing to eliminate the DOEA fee from the Schedule.

#### \$500 Application Fee for a Request for a Waiver Pursuant to PCX Rule 2.5(c)(4)

The Exchange's Shareholder and Registration Services Department has received numerous questions about the application of the \$500 application fee for a request for a waiver pursuant to PCX Rule 2.5(c)(4). Option Trading Permit Holders ("OTP Holders") and applicants have expressed a desire for further clarification as to the circumstances under which they would be subject to the fee. The purpose of the fee is to allow the Exchange to recover

costs associated with independently verifying each justification given by an applicant as to why a waiver should be granted.<sup>3</sup> The fee does not apply to circumstances where the Exchange only has to verify that an applicant has successfully completed an examination. Therefore, the Exchange is proposing to add clarifying language to the Schedule that states the fee does not apply when the request only involves validating that an applicant has successfully completed a qualifying examination.

### Administrative Changes

The Exchange is proposing certain changes to the Schedule that will eliminate typographical errors, correct grammatical errors and amend calendar references. In addition, the Exchange is proposing certain clarifying language that is designed to make the Schedule easier to comprehend. Specifically, the Exchange is clarifying that for the Vendor Equipment Room Usage Fee, firms not using a full cabinet will not pay the full fee. Instead such firms will pay a pro rata portion thereof.

### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act<sup>4</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>5</sup> in particular, in that the proposal provides for the equitable allocation of reasonable dues, fees and other charges among the Exchange's OTP Holders and other persons using the Exchange's facilities for trading option contracts.

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<sup>3</sup> See Securities Exchange Act Release No. 50742 (November 29, 2004), 69 FR 70488 (December 6, 2004) (SR-PCX-2004-101).

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

<sup>5</sup> 15 U.S.C. 78f(b)(4).

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

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>6</sup> and Rule 19b-4(f)(2) thereunder,<sup>7</sup> because the proposed rule change establishes or changes a due, fee or other charge applicable only to a member of the Exchange. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further the purposes of the Act.<sup>8</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:

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<sup>6</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>7</sup> 17 CFR 240.19b-4(f)(2).

<sup>8</sup> For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers that period to commence on January 13, 2005, the date the Exchange filed Amendment No. 2 to the proposed rule change. See 15 U.S.C. 78s(b)(3)(C).

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-2004-125 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-PCX-2004-125. 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 office of the Exchange. 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-2004-125 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>9</sup> 17 CFR 200.30-3(a)(12).