SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52675; File No. SR-PCX-2005-75)

October 25, 2005

Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change and Amendment No. 1 Thereto Relating to Offers of Settlement

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 ("Act") and Rule 19b-4[2] thereunder, notice is hereby given that on June 13, 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 September 21, 2005, PCX submitted Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice and order to solicit comments on the proposed rule change, as amended, from interested persons and simultaneously is approving the proposal, as amended, on an accelerated basis.

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

PCX is proposing to amend PCX Rule 10.6 pertaining to offers of settlement. The text of the proposed rule change, as amended, is available on PCX's Web site (http://www.pacificex.com), at the PCX's principal office, and at the Commission's Public Reference Room.

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Amendment No. 1.

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 III 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange states that the purpose of the proposed rule change is to revise the procedures for offers of settlement submitted in Exchange enforcement actions against Options Trading Permit ("OTP") Holders and OTP Firms in order to make the disciplinary process more efficient and effective while maintaining appropriate OTP Holder and OTP Firm involvement in the oversight of the settlement process.

Currently, all offers of settlement, whether contested or uncontested by the Exchange's Department of Enforcement, are considered by the Ethics and Business Conduct Committee ("EBCC") for acceptance or rejection. If an offer of settlement is accepted by the EBCC, the EBCC issues a decision, and the Respondent[4] cannot seek review of the decision. EBCC decisions are then submitted to the PCX Board of Directors (the "Board") in order to provide the Board with an opportunity to accept or reject the offer of settlement. This process is subject to the delays occurring between the time when the EBCC accepts an offer of settlement and the time when the Board subsequently reviews the accepted offer of

[4] See PCX Rule 10.4 (defining "Respondent").

settlement. Consequently, the imposition of disciplinary measures intended to prevent misconduct and maintain the integrity of the marketplace are also delayed.

Under the proposed rule change, an offer of settlement would be "uncontested" when a Respondent makes an offer and the Department of Enforcement does not oppose it.[5] In cases of uncontested offers of settlement made before a complaint has been issued, the General Counsel of the Exchange would have the authority to accept or reject the offers and decisions.[6] Similarly, in cases of uncontested offers of settlement made after a complaint has been issued but before the hearing on the merits, the General Counsel of the Exchange would have the authority to accept or reject the offers and decisions.[7] Finally, in cases of uncontested offers of settlement made after a hearing on the merits has begun, the Conduct Panel for the hearing would have the authority to accept or reject offers and decisions.[8]

Any offer of settlement opposed by the Department of Enforcement would be "contested."[9] Under the proposal, Respondents would not be permitted to submit contested offers of settlement for consideration by the EBCC or the Conduct Panel before a complaint

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5 See proposed PCX Rule 10(e)(1). The Commission notes that the Exchange's Department of Enforcement would transmit the Respondent's uncontested offer of settlement, along with a proposed decision, to either the Exchange's General Counsel or the Conduct Panel, as appropriate.

6 See proposed PCX Rule 10(e)(2). When a Respondent submits an offer of settlement, the Department of Enforcement drafts a decision accepting the offer and submits both documents to the appropriate body. See Letter from Alden Adkins, Chief Regulatory Officer, PCX, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated October 6, 2005.

7 See proposed PCX Rule 10(e)(3).

8 See proposed PCX Rule 10(e)(4).

9 See proposed PCX Rule 10(f)(1). The Commission notes that the Exchange's Department of Enforcement would transmit the Respondent's contested offer of settlement, along with a proposed decision, to either the EBCC or the Conduct Panel, as appropriate.

has been issued.[10] In cases of contested offers of settlement made after a complaint has been issued but before a hearing on the merits has begun, the EBCC would have the authority to accept or reject the offers and decisions,[11] which is consistent with current PCX practices. In cases of contested offers of settlement made after a hearing on the merits has begun, the Conduct Panel would have the authority to accept or reject the offers and decisions.[12] Any offer of settlement submitted by a Respondent to the Conduct Panel after a hearing on the merits has begun would not stay the proceedings, unless the Conduct Panel decides to stay the proceedings.[13]

All offers of settlement would become final upon acceptance by the General Counsel of the Exchange, the EBCC, or the Conduct Panel, as appropriate, and thus Board approval of offers of settlement would no longer be required. Under the proposal, the Board and the EBCC would review on a quarterly basis all offers of settlement after-the-fact to provide guidance and feedback to the Department of Enforcement and the General Counsel of the Exchange concerning appropriate settlement practices and amounts.[14]

In addition, the proposed rule change sets forth certain requirements with which offers of settlement must comply.[15] These requirements include that the offer be in writing and signed by the person making the offer, and that the offer set forth certain details stating the statutory provisions or rules alleged to have been violated, the acts or practices that the

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10 See proposed PCX Rule 10(f)(2).

11 See proposed PCX Rule 10(f)(3).

12 See proposed PCX Rule 10(f)(4).

13 See proposed PCX Rule 10(a)(2).

14 See proposed PCX Rule 10(k). Neither the Board's nor the EBCC's action will affect any issued decisions.

15 See proposed PCX Rule 10(c).

OTP Holder or OTP Firm is alleged to have engaged in or omitted, findings of fact, proposed sanctions, and the effective date of such proposed sanctions.

Finally, the proposed rule change sets forth certain rights that a Respondent waives upon submission of an offer of settlement to the PCX. In particular, a Respondent waives his right to: (1) claim bias or prejudgment by certain individuals; (2) appeal before PCX committees, the Commission, and federal, state, and local courts; and (3) claim violations of the ex parte prohibitions of PCX Rule 10.3.[16] The Exchange believes that waiver of such rights is appropriate in light of the proposed rule's intent, which is to create a more efficient and effective disciplinary process.[17]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act[18] in general, and furthers the objectives of Section 6(b)(5) of the Act[19] in particular, because it is 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

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.

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16 See proposed PCX Rule 10(d).

17 Paragraph (j) of the proposed rule change provides that a Respondent shall not be prejudiced by an offer of settlement that is rejected.

18 15 U.S.C. 78f(b).

19 15 U.S.C. 78f(b)(5).

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. 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. Please include File Number SR-PCX-2005-75 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-PCX-2005-75. 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 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-2005-75 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[20] Specifically, the Commission believes that the proposal is consistent with Section 6(b)(7) of the Act,[21] which requires that the rules of an exchange provide a fair procedure for the discipline of its members and persons associated with its members. The Commission also believes that the proposal is reasonably designed to provide a more efficient disciplinary process to address violations of the Exchange's rules and the federal securities laws by the Exchange's members.

Under the Exchange's proposal, a Respondent may propose an uncontested offer of settlement to the Exchange's Department of Enforcement in response to the initiation of a

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[20] In approving this proposed rule change, as amended, the Commission has considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

[21] 15 U.S.C. 78f(b)(7).

disciplinary inquiry by the Department of Enforcement.[22] If the Respondent submits an uncontested offer of settlement before a hearing on the merits has begun, then the Department of Enforcement would transmit the uncontested offer, along with a proposed decision, to the Exchange's General Counsel for consideration. Specifically, if a Respondent submits an uncontested offer of settlement before the issuance of a complaint, and the General Counsel accepts it, then the Department of Enforcement would issue the decision and notify the parties. If a Respondent submits an uncontested offer of settlement after the Department of Enforcement has issued a complaint, and the General Counsel accepts it, then the General Counsel would issue the decision and notify the parties. Finally, if the Respondent submits an uncontested offer of settlement after a hearing on the merits has begun, then the Department of Enforcement would transmit the uncontested offer, along with a proposed decision, to the Conduct Panel for consideration. If the Conduct Panel accepts the decision, then the General Counsel would issue the decision and notify the parties.

The Commission believes that the involvement of the Exchange's General Counsel in considering uncontested offers of settlement submitted before a hearing on the merits has begun should be an appropriate safeguard and provides for an appropriate separation of functions at the Exchange. Further, the Commission believes that the proposal is reasonably designed to advance the interests of the Exchange's Department of Enforcement in efficiently and expeditiously resolving disciplinary cases when an uncontested offer of settlement is made before the commencement of a hearing on the

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[22] The Exchange represents that it contacts a Respondent before any complaint is issued, such that the Respondent would be in a position to ascertain whether the terms of any contemplated offer of settlement would be "uncontested" or "contested" by the Exchange's Department of Enforcement.

merits without the involvement of the EBCC, while providing for review and consideration of possible violations. In particular, the Commission believes that the involvement of the Department of Enforcement and General Counsel in considering and rendering decisions on uncontested offers of settlement before the commencement of a hearing on the merits is appropriate, given the Respondent's choice to propose settlement terms that the Exchange's Department of Enforcement considers acceptable.

Additionally, the proposal allows a Respondent, after a complaint has been issued, to submit an offer of settlement for consideration that is otherwise opposed on its terms, i.e., contested, by the Exchange's Department of Enforcement. If submitted before a hearing on the merits, a contested offer of settlement would be considered by the EBCC. If a Respondent submits a contested offer of settlement after a hearing on the merits has begun, the offer would be considered by the Conduct Panel. The Commission believes that this process is reasonably designed to allow Respondents to have their contested offers of settlement considered by the EBCC or the Conduct Panel when the offer would otherwise be opposed by the Exchange's Department of Enforcement. In addition, the Commission believes that this process balances the Exchange's interests in achieving efficient resolutions of disciplinary matters with its members' interests in having a process through which they can submit contested offers of settlement for consideration by the EBCC or the Conduct Panel. The Commission notes that under current PCX Rule 10, all offers of settlement are considered by the EBCC.

In particular, the Commission notes that contested offers of settlement submitted after the issuance of a complaint but before the commencement of a hearing on the merits would be considered by the EBCC, and contested offers of settlement submitted after the

issuance of a complaint and after the commencement of a hearing on the merits would be considered by the Conduct Panel. The Commission believes that this procedure provides a fair process by which the Exchange's members may take their contested offers of settlement before the EBCC or Conduct Panel, both of which are comprised primarily of the OTP Holders or allied persons of OTP Firms.

Moreover, the proposed rule change sets forth in detail provisions relating to the content and signature requirements for offers of settlement, as well as waivers of certain rights upon submission of an offer of settlement. Additionally, the proposal provides for quarterly review by the EBCC and the Board Appeals Committee of final disciplinary actions in order to provide the Department of Enforcement and General Counsel with guidance on future settlement practices and settlement amounts. The Commission believes that this provision is reasonably designed to provide for EBCC and Board input, albeit on a prospective basis only, on the Exchange's disciplinary program, thereby providing a mechanism for the Board to comply with the self-regulatory organization's responsibility to maintain an adequate and effective disciplinary system.

The Commission finds good cause for approving this proposal before the thirtieth day after the publication of notice thereof in the Federal Register. Accelerating approval of the proposal will allow the Exchange to implement, without undue delay, a more efficient process for reviewing and deciding upon offers of settlement, while maintaining OTP Holder and OTP Firm involvement in the settlement process. In addition, the Commission notes that the NASD has a substantially similar rule with respect to offers of settlement.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[23] that the proposed rule change, as amended (SR-PCX-2005-75), is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[24]

Jonathan G. Katz
Secretary

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23 15 U.S.C. 78s(b)(2).

24 17 CFR 200.30–3(a)(12).