

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 will also be available for inspection and copying at the principal office of the ISE. All submissions should refer to File No. SR-ISE-2004-03 and should be submitted by March 31, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁹

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 04-5379 Filed 3-9-04; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49347; File No. SR-PCX-2002-66]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. Relating to Marking Orders and Affirmative Determinations

March 1, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") and Rule 19b-4 thereunder,² notice is hereby given that on September 30, 2002, the Pacific Exchange, Inc. ("PCX") filed with the Securities and Exchange Commission a proposed rule change relating to marking orders and affirmative determinations. On January 2, 2004, the PCX filed Amendment No. 1 to the proposed rule change, which replaced the original filing in its entirety. Amendment No. 1 is described in Items I, II and III below, which the PCX has prepared. 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 PCX, through its wholly owned subsidiary PCX Equities, Inc. ("PCXE"), proposes to amend PCXE Rule 7.16(c) regarding an ETP Holder's obligation to make affirmative determinations. The text of the proposed rule change is

below. New text is italicized and deleted text is in brackets.

* * * * *

Rule 7.16(c) *Marking Orders and Affirmative Determinations* [No ETP Holder of the Corporation shall mark a sell order "long" unless (1) the security to be delivered after sale is carried in the account for which the sale is to be effected or (2) such ETP Holder is informed that the seller owns the security ordered to be sold, and as soon as is possible without undue inconvenience or expense, will deliver the security owned to the account for which the sale is to be effected.]

(1) *Long Sales—No ETP Holder or associated person for whom the Exchange serves as the Designated Examining Authority may accept a long sale order from any customer in any security (except exempt securities other than municipals) unless:*

(A) *The ETP Holder has possession of the security;*

(B) *The security is long in the customer's account with the ETP Holder;*

(C) *The ETP Holder or associated person makes an affirmative determination that the customer owns the security and will deliver it in good deliverable form within three (3) business days of the execution of the order; or*

(D) *The security is on deposit in good deliverable form with an ETP Holder of the Exchange, a member of a national securities exchange, a broker/dealer registered with the SEC, or any organization subject to state or federal banking regulations and that instructions have been forwarded to that depository to deliver the securities against payment.*

(2) *Short Sales*

(A) *Customer short sales—No ETP Holder or associated person for whom the Exchange serves as the Designated Examining Authority shall accept a "short" sale order for any customer in any security unless the ETP Holder or associated person makes an affirmative determination that the ETP Holder will receive delivery of the security from the customer or that the ETP Holder can borrow the security on behalf of the customer for delivery by settlement date. This requirement does not apply, however, to transactions in corporate debt securities.*

(B) *Proprietary short sales—No ETP Holder may effect a "short" sale for its own account in any security unless the ETP Holder or associated person makes an affirmative determination that the ETP Holder can borrow the securities or otherwise provide for delivery of the*

securities by the settlement date. This requirement will not apply to transactions in corporate debt securities, to bona fide market making transactions by an ETP Holder in securities in which it is registered as an exchange market maker, or to transactions that result in fully hedged or arbitrated positions. For the purposes of this paragraph, transactions unrelated to normal market making activity, such as index arbitrage and risk arbitrage that are independent from an ETP Holder's market making functions, will not be considered bona fide market making activity. Similarly, bona fide market making would exclude activity that is related to speculative selling strategies of the ETP Holder or investment decisions of the firm and is disproportionate to the usual market making patterns or practices of the ETP Holder in that security.

(3) *Affirmative Determination*

(A) *To satisfy the requirements for an "affirmative determination" contained in subsection (c)(1)(C) above for long sales, the ETP Holder or associated person must make a notation on the order ticket at the time the order is taken that reflects the conversation with the customer as to the present location of the securities in question, whether they are in good deliverable form and the customer's ability to deliver them to the ETP Holder within three (3) business days.*

(B) *To satisfy the requirement for an "affirmative determination" contained in subsection (c)(2)(B) above for customer and proprietary short sales, the ETP Holder or associated person must keep a written record that includes: (i) If a customer assures delivery, the present location of the securities in question, whether they are in good deliverable form and the customer's ability to deliver them to the ETP Holder within three (3) business days; or (ii) if the ETP Holder or associated person locates the stock, the identity of the individual and firm contacted who offered assurance that the shares would be delivered or that were available for borrowing by settlement date and the number of shares needed to cover the short sale.*

(C) *The manner by which an ETP Holder or associated person annotates compliance with the "affirmative determination" requirement contained above (e.g., marking the order ticket, recording inquiries in a log, etc.) is not specified by this Rule and, therefore, will be decided by each ETP Holder. ETP Holders may rely on "blanket" or standing assurances (i.e., "Easy to Borrow" lists) that securities will be*

⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

available for borrowing on settlement date to satisfy their affirmative determination requirements under this Rule. For any short sales executed in Nasdaq National Market ("NNM") or national securities exchange-listed ("listed") securities, ETP Holders also may rely on "Hard to Borrow" lists indicating NNM or listed securities that are difficult to borrow or unavailable for borrowing on settlement date to satisfy their affirmative determination requirements under this Rule, provided that: (i) any security restricted i.e., subject to NASD UPC Rule 11830, must be included on such a list; and (ii) the creator of the list attests in writing on the document or otherwise that any NNM or listed securities not included on the list are easy to borrow or are available for borrowing. ETP Holders are permitted to use Easy to Borrow or Hard to Borrow lists provided: (i) The information used to generate the list is less than 24-hours old; and (ii) the ETP Holder delivers the security on settlement date. Should an ETP Holder relying on an Easy to Borrow or Hard to Borrow list fail to deliver the security on settlement date, the Exchange will deem such conduct inconsistent with the terms of this Rule, absent mitigating circumstances such as a verifiable disruption or malfunction of an execution or communication system or such intervening act that may be demonstrated and adequately documented by the ETP Holder.

(4) *Bona Fide Fully Hedged and Bona Fide Fully Arbitrated*—In determining the availability of the exemption provided in paragraph (2)(b) above for "bona fide fully hedged" and "bona fide fully arbitrated" transactions, the Exchange may apply the following guidelines:

(A) *Bona Fide Fully Hedged*—The following transactions will be considered bona fide fully hedged: (i) Short a security and long a convertible debenture, preferred or other security which has a conversion price at or in the money and is convertible within ninety days into the short security; (ii) short a security and long a call which has a strike price at or in the money and which is exercisable within 90 calendar days into the underlying short security; (iii) short a security and long a position in warrants or rights which are exercisable within 90 days into the short security. To the extent that the long warrants or rights are "out of the money," then the short position will be exempt up to the market value of the long warrants or rights.

(B) *Bona Fide Fully Arbitrated*—The following transactions shall be considered bona fide fully arbitrated: (i)

Long a security purchased in one market together with a short position from an offsetting sale of the same security in a different market at or nearly the same time as practicable for the purpose of taking advantage of a difference in price in the two markets; (ii) long a security which is without restriction other than the payment of money exchangeable or convertible within 90 calendar days of the purchase into a second security together with a short position from an off-setting sale of the second security at or about the same time for the purpose of taking advantage of a concurrent disparity in the prices of the securities.

(C) *The transaction date of the short sale will govern when a fully hedged or fully arbitrated position exists.*

(d)–(f)—No change.

* * * * *

Rule 7.18(a)–(c)—No change.

(d) *Applicability.* The following Rules of the Corporation will not be applicable to transactions on the Corporation in Nasdaq Securities. 7.16 (a, d and e), 7.55–7.57.

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 that it had received. The text of the 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 the statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Proposed PCXE Rule 7.16(c)(1) ("Long Sales") states that no ETP Holder or associated person for whom the PCX serves as the Designated Examining Authority ("DEA") may accept a long sale order from any customer in any security (except exempt securities other than municipals) unless: (A) The ETP Holder has possession of the security; (B) the security is long in the customer's account with the ETP Holder; (C) the ETP Holder or associated person makes an affirmative determination that the customer owns the security and will deliver it in good deliverable form within three business days of the execution of the order; or (D) the security is on deposit in good

deliverable form with an ETP Holder of the PCX, a member of a national securities exchange, a broker-dealer registered with the Commission, or any organization subject to state or federal banking regulations, and that instructions have been forwarded to that depository to deliver the securities against payment.

Proposed PCXE Rule 7.16(c)(2) ("Short Sales") provides that, with respect to customer short sales, no ETP Holder or associated person for whom the PCX serves as the DEA shall accept a "short" sale order for any customer in any security unless the ETP Holder or associated person makes an affirmative determination that the ETP Holder will receive delivery of the security from the customer or that the ETP Holder can borrow the security on behalf of the customer for delivery by settlement date. As proposed, the rule provides that this requirement does not apply to transactions in corporate debt securities.

The proposed rule further provides that no ETP Holder may effect a "short" sale for its own account in any security unless the ETP Holder or associated person makes an affirmative determination that the ETP Holder can borrow the securities or otherwise provide for delivery of the securities by the settlement date. The proposed rule provides that this requirement will not apply to transactions in corporate debt securities, to *bona fide* market making transactions by an ETP Holder in securities in which it is registered as a PCX market maker, or to transactions that result in fully hedged or arbitrated positions. The proposed rule further clarifies that transactions unrelated to normal market making activity, such as index arbitrage and risk arbitrage that are independent from an ETP Holder's market making functions, will not be considered *bona fide* market making activity. Similarly, *bona fide* market making would exclude activity that is related to speculative selling strategies of the ETP Holder or investment decisions of the firm and is disproportionate to the usual market making patterns or practices of the ETP Holder in that security.

Proposed PCXE Rule 7.16(c)(3) ("Affirmative Determination") provides that in order to satisfy the requirements for an "affirmative determination" for long sales, the ETP Holder or associated person must make a notation on the order ticket at the time the order is taken that reflects the conversation with the customer as to the present location of the securities in question, whether they are in good deliverable form, and the customer's ability to deliver them to the ETP Holder within three business

days. The proposed rule further provides that in order to satisfy the requirement for an "affirmative determination" for customer and proprietary short sales, the ETP Holder or associated person must keep a written record that includes: (i) If a customer assures delivery, the present location of the securities in question, whether they are in good deliverable form, and the customer's ability to deliver them to the ETP Holder within three business days; or (ii) if the ETP Holder or associated person locates the stock, the identity of the individual and firm contacted who offered assurance that the shares would be delivered or that were available for borrowing by settlement date and the number of shares needed to cover the short sale.

The proposed rule further provides that the manner by which an ETP Holder or associated person annotates compliance with the "affirmative determination" requirement discussed above (e.g., marking the order ticket, recording inquiries in a log, etc.) is not specified by the Rule and, therefore, will be decided by each ETP Holder. As proposed, ETP Holders may rely on "blanket" or standing assurances (i.e., "Easy to Borrow" lists) that securities will be available for borrowing on settlement date to satisfy their affirmative determination requirements under this Rule. For any short sales executed in NASDAQ National Market ("NNM") or national securities exchange listed ("listed") securities, the proposed rule provides that ETP Holders also may rely on "Hard to Borrow" lists indicating the NNM or listed securities that are difficult to borrow or unavailable for borrowing on settlement date to satisfy their affirmative determination requirements under this Rule, provided that (i) Any securities that are subject to NASD Uniform Practice Code Rule 11830 (i.e., any Nasdaq securities that have a clearing short position of 10,000 shares or more and that are equal to at least one-half of one percent of the issue's total shares outstanding) must be included on such a list; and (ii) the creator of the list attests in writing on the document or otherwise that any NNM or listed securities not included on the list are easy to borrow or are available for borrowing. The proposed rule further provides that ETP Holders are permitted to use Easy to Borrow or Hard to Borrow lists provided that: (i) The information used to generate the list is less than 24-hours old; and (ii) the ETP Holder delivers the security on settlement date. Should an ETP Holder relying on an Easy to Borrow or Hard to

Borrow list fail to deliver the security on settlement date, the PCX will deem such conduct inconsistent with the terms of this Rule, absent mitigating circumstances such as a verifiable disruption or malfunction of an execution or communication system or such intervening act that may be demonstrated and adequately documented by the ETP Holder.

Proposed Rule 7.16(c)(4) ("*Bona Fide Fully Hedged and Bona Fide Fully Arbitrated*") provides that the PCX may apply certain guidelines in determining the availability of the exemption provided for "*bona fide fully hedged*" and "*bona fide fully arbitrated*" transactions. Under the proposed rule, the following transactions would be considered *bona fide fully hedged*: (i) Short a security and long a convertible debenture, preferred, or other security that has a conversion price at or in the money and is convertible within ninety days into the short security; (ii) short a security and long a call that has a strike price at or in the money and which is exercisable within 90 calendar days into the underlying short security; (iii) short a security and long a position in warrants or rights that are exercisable within 90 days into the short security. To the extent that the long warrants or rights are "out of the money," then the short position will be exempt up to the market value of the long warrants or rights.

The proposed rule further provides that the following transactions shall be considered *bona fide fully arbitrated*: (i) Long a security purchased in one market together with a short position from an offsetting sale of the same security in a different market at as nearly the same time as practicable for the purpose of taking advantage of a difference in price in the two markets; (ii) long a security which is without restriction other than the payment of money exchangeable or convertible within 90 calendar days of the purchase into a second security together with a short position from an off-setting sale of the second security at or about the same time for the purpose of taking advantage of a concurrent disparity in the prices of the securities. The proposed rule provides that the transaction date of the short sale will govern when a fully hedged or fully arbitrated position exists.

The Commission notes that proposed Regulation SHO under the Act,³ which the Commission recently published for public comment, would require short sellers in all equity securities to locate securities to borrow before selling and

would impose strict delivery requirements on securities where many sellers have failed to deliver the securities.

2. Basis

The PCX believes that the proposal is consistent with Section 6(b) of the Act⁴ and furthers the objectives of Section 6(b)(5)⁵ of the Act in that it is designed to promote just and equitable principles of trade, prevent fraudulent and manipulative acts and practices, and protect investors and the public interest.

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

The 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

The PCX 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

Within 35 days after 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 that date if it finds the longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the PCX 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 amended 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. Comments may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-PCX-2002-66, and this file number should be included on the subject line

³ See Securities Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972 (Nov. 6, 2003).

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(5).

if e-mail is used. To help the Commission process and review your comments more efficiently, comments may be sent in hard copy or by e-mail, but not by both methods. 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 will also be available for inspection and copying at the principal office of the PCX. All submissions should be submitted by March 31, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁶

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 04-5376 Filed 3-9-04; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. OST-1995-950]

Agency Information Collection Activity; Request for Extension Without Change of Currently Approved Information Collection

AGENCY: Office of the Secretary, DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35, as amended), this notice announces the Department of Transportation's (DOT) intention to request an extension without change for a currently approved information collection.

DATES: Comments on this notice must be received by May 10, 2004.

ADDRESSES: You may submit comments to Docket Number OST-1995-950. All submissions must include agency name and docket number and may be submitted by any of the following methods:

- *Web site:* <http://dms.dot.gov>.

Follow the instructions for submitting comments on the DOT electronic docket site.

- *Fax:* 1-202-493-2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-0001.
- *Hand Delivery:* Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Docket: For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Schmidt, Competition and Policy Analysis Division (X-55), Office of Aviation Analysis, Office of the Secretary, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-5420.

SUPPLEMENTARY INFORMATION:

Title: Passenger Manifest Information.
OMB Control Number: 2105-0534.

Type of Request: Extension without change of a currently approved collection.

Affected Public: Air Carriers

Abstract: Public Law 101-604

(entitled the Aviation Security Improvement Act of 1990, or "ASIA 90," and later codified as 49 U.S.C. 44909) requires that certificated air carriers and large foreign air carriers collect the full name of each U.S. citizen traveling on flight segments to or from the United States and solicit a contact name and telephone number. In case of an aviation disaster, airlines would be required to provide the information to the Department of State and, in certain instances, to the National Transportation Safety Board. Each carrier would develop its own collection system. The Passenger Manifest Information; Final Rule (14 CFR part 243) was published in the **Federal Register**, Vol. 63., No. 32 (February 18, 1998). The rule was effective March 20, 1998.

Respondents: 23,245.

Total Annual Burden on Respondents: 1.05 million hours.

Comments: (a) Whether the continued collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of

the current information collection; (c) ways to enhance the quality, utility, and clarity of the information being collected; and (d) ways to minimize the burden of the collection of information of respondents, including the use of automated collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Issued in Washington, DC, on March 3, 2004.

Randall D. Bennett,

Director, Office of Aviation Analysis.

[FR Doc. 04-5347 Filed 3-9-04; 8:45 am]

BILLING CODE 4910-62-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application (04-03-C-00-FNL) To Impose and To Use a Passenger Facility Charge (PFC) at the Fort Collins-Loveland Municipal Airport, Submitted by the City of Fort Collins and City of Loveland, CO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use a PFC at the Fort Collins-Loveland Municipal Airport under the provisions of 49 U.S.C. 40117 and Part 158 of the Federal Aviation Regulations (14 CFR 158).

DATES: Comments must be received on or before April 9, 2004.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Craig Sparks, Manager; Denver Airports District Office, DEN-ADO; Federal Aviation Administration; 26805 E. 68th Avenue, Suite 224; Denver, CO 80249-6361.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. David C. Gordon, A.A.E., at the following address: 4900 Earhart Road, Loveland, CO 80538.

Air Carriers and foreign air carriers may submit copies of written comments previously provided to the Fort Collins-Loveland Municipal Airport, under § 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Mr. Christopher Schaffer, (303) 342-1258; Denver Airports District Office, DEN-ADO; Federal Aviation Administration; 26805 E. 68th Avenue, Suite 224;

⁶ 17 CFR 200.30-3(a)(12).