

Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Comments should be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR-Amex-2004-09. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should 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 such filing will also be available for inspection and copying at the principal office of Amex. All submissions should be submitted by March 31, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>17</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49354; File No. SR-ISE-2004-03]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the International Securities Exchange, Inc. Relating to the Elimination of the Marketing Fee

March 2, 2004.

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 February 23, 2004, the International Securities Exchange, Inc. ("ISE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which the ISE 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 Exchange proposes to amend its Schedule of Fees to eliminate the Marketing Fee.

#### 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 ISE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The ISE 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 proposes to amend its Schedule of Fees to eliminate the Marketing Fee. The Marketing Fee is a \$.10 per contract execution fee that is charged to a market maker for each contract it executes against a public customer. The fee was used to support Exchange-wide marketing efforts.<sup>3</sup> The fee is currently waived until June 30, 2004.<sup>4</sup> The Exchange is proposing to eliminate this fee to reduce its fees for members; the Exchange will support marketing efforts out of general revenues.

###### 2. Statutory Basis

The Exchange believes that this proposal to amend its schedule of dues, fees and charges would be an equitable allocation of reasonable fees among ISE members, and that the proposal is consistent with Section 6(b) of the Act<sup>5</sup>

<sup>3</sup> The Commission notes that the ISE's marketing fee received approval by the Commission for implementation in 2001. See Securities Exchange Act Release No. 44101 (March 26, 2001), 66 FR 17590 (April 2, 2001) (SR-ISE-01-06).

<sup>4</sup> The Commission notes that the marketing fee was first waived in SR-ISE-2002-16. See Securities Exchange Act Release No. 46189 (July 11, 2002), 67 FR 47587 (July 19, 2002). The waiver has subsequently been extended three times. See Securities Exchange Act Release Nos. 46976 (December 9, 2002), 67 FR 77116 (December 16, 2002) (SR-ISE-2002-26); 48219 (July 3, 2002), 68 FR 41409 (July 11, 2002) (SR-ISE-2003-16); and 48955 (December 18, 2003), 68 FR 75007 (December 29, 2003) (SR-ISE-2003-31).

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

and furthers the objectives of Section 6(b)(4) of the Act.<sup>6</sup>

##### 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.

##### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The ISE neither solicited nor received written comments on this proposal.

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

The foregoing proposed rule change has been designated as a fee change pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>7</sup> and Rule 19b-4(f)(2)<sup>8</sup> thereunder. Accordingly, the proposal has taken effect upon filing with the Commission. At any time within 60 days after the filing of the proposed rule change, the Commission may summarily abrogate the 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. 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-ISE-2004-03. 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, comments should 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

<sup>6</sup> 15 U.S.C. 78f(b)(4).

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>8</sup> 17 CFR 240.19b-4(f)(2).

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

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

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

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.<sup>9</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

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## 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,<sup>2</sup> 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*

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

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

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