

manipulative concerns.<sup>19</sup> As discussed more fully above, the underlying stocks comprising the Index are well-capitalized, highly liquid stocks. Moreover, the issuers of the underlying securities comprising the Index are subject to reporting requirements under the Act, and all of the component stocks are either listed or traded on, or traded through the facilities of, U.S. securities markets. Additionally, the Amex's surveillance procedures will serve to deter as well as detect any potential manipulation.

Furthermore, the Commission notes that the Notes are depending upon the individual credit of the issuer, Wachovia. To some extent this credit risk is minimized by the Exchange's listing standards in Section 107A of the Company Guide which provide the only issuers satisfying substantial asset and equity requirements may issue securities such as the Notes. In addition, the Exchange's "Other Securities" listing standards further require that the Notes have a market value of at least \$4 million.<sup>20</sup> In any event, financial information regarding Wachovia in addition to the information on the 500 common stocks comprising the Index will be publicly available.<sup>21</sup>

The Commission also has a systemic concern, however, that a broker-dealer such as Wachovia, or a subsidiary providing a hedge for the issuer will incur position exposure. However, as the Commission has concluded in previous orders for other hybrid instruments issued by broker-dealers,<sup>22</sup> the Commission believes that this concern is minimal given the size of the

<sup>19</sup> The issuer Wachovia disclosed in the prospectus that the original issue price of the Notes includes commissions (and the secondary market prices are likely to exclude commissions) and Wachovia's costs of hedging its obligations under the Notes. These costs could increase the initial value of the Notes, thus affecting the payment investors receive at maturity. The Commission expects such hedging activity to be conducted in accordance with applicable regulatory requirements.

<sup>20</sup> See Company Guide Section 107A.

<sup>21</sup> The Commission notes that the 500 component stocks that comprise the Index are reporting companies under the Act, and the Notes will be registered under Section 12 of the Act.

<sup>22</sup> See Securities Exchange Act Release Nos. 44913 (October 9, 2001), 66 FR 52469 (October 15, 2001) (order approving the listing and trading of notes whose return is based on the performance of the Nasdaq-100 Index) (File No. SR-NASD-2001-73); 44483 (June 27, 2001), 66 FR 35677 (July 6, 2001) (order approving the listing and trading of notes whose return is based on a portfolio of 20 securities selected from the Amex Institutional Index) (File No. SR-Amex-2001-40); and 37744 (September 27, 1996), 61 FR 52480 (October 7, 1996) (order approving the listing and trading of notes whose return is based on a weighted portfolio of healthcare/biotechnology industry securities) (File No. SR-Amex-96-27).

Notes issuance in relation to the net worth of Wachovia.

Finally, the Commission notes that the value of the Index will be disseminated at least once every fifteen seconds throughout the trading day. The Commission believes that providing access to the value of the Index at least once every fifteen seconds throughout the trading day is extremely important and will provide benefits to investors in the product.

The Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of the notice of filing thereof in the **Federal Register**. The Exchange has requested accelerated approval because this product is similar to several other instruments currently listed and traded on the Amex.<sup>23</sup> The Commission believes that the Notes will provide investors with an additional investment choice and that accelerated approval of the proposal will allow investors to begin trading the Notes promptly. Additionally, the Notes will be listed pursuant to Amex's existing hybrid security listing standards as described above. Therefore, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,<sup>24</sup> to approve the proposal on an accelerated basis.

## V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>25</sup> that the proposed rule change (SR-Amex-2004-57) is hereby approved on an accelerated basis.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>26</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

[FR Doc. E4-1982 Filed 8-30-04; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50237; File No. SR-NYSE-2004-37]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Procedures for Gapping the Quote

August 24, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934

<sup>23</sup> See *supra* note 11.

<sup>24</sup> 15 U.S.C. 78f(b)(5) and 78s(b)(2).

<sup>25</sup> 15 U.S.C. 78o-3(b)(6) and 78s(b)(2).

<sup>26</sup> 17 CFR 200.30-3(a)(12).

("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 2, 2004, the New York Stock Exchange ("NYSE" 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. The proposed rule change has been filed by the NYSE as a "non-controversial" rule change pursuant to Rule 19b-4(f)(6) under the Act.<sup>3</sup> 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 NYSE proposes to describe its new procedures for gapping the quote. The proposed rule text consists of NYSE Information Memo 04-27 (June 9, 2004), which the Exchange previously sent out to its members and member organizations. The text of the proposed rule change is available for viewing on the Commission's Web site, <http://www.sec.gov/rules/sro.shtml>, and at the Exchange and the Commission.

### 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 parts of such statements.

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

##### 1. Purpose

The NYSE believes that its auction market provides valuable opportunities to price transactions fairly to all investors in a way that truly reflects supply and demand. According to the Exchange, at the moment of that pricing, transparency of any imbalance is critical to attract participation to offset the imbalance and facilitate price discovery. In that regard, the NYSE is updating its policies with respect to situations

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

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

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

involving gapping the quote to achieve greater transparency in light of faster market conditions and technology. The Exchange believes that the procedures that are being updated will provide improved opportunities for all market participants to access the NYSE market and serve customers, improving transparency in situations where gapped quotations are used.

### Background

The purpose of the proposed rule change is to discuss the procedures for gapping the quote, as currently described in Information Memo 94–32 (August 9, 1994)<sup>4</sup> and the 2003 Floor Official Manual.<sup>5</sup> The modification involves a new procedure for specifying the size in gapped quoting situations, making the size of the gapped quote 100 shares  $\times$  size or size  $\times$  100 shares, instead of 100 shares  $\times$  100 shares. In addition, the new procedure shortens the reasonable period of time for the gapped quotation to remain in place in light of faster market conditions and technology.<sup>6</sup>

According to the Exchange, the purpose of the gapped quote procedures is to provide public dissemination of an order imbalance and to minimize short-term price dislocation associated with such imbalance by allowing appropriate time for the entry of offsetting orders or the cancellation of orders on the side of the imbalance. An imbalance may occur when the specialist receives a sudden influx of orders on the same side of the market at the same time or when there are one or more large-size orders and there is no offsetting interest. An imbalance may also occur when a member proposes to effect a one-sided block transaction at a significant premium or discount from the prevailing market.

When an imbalance exists, the gapped quote procedures provide that the specialist widen the spread between the bid and offer, a process known as “gapping.” In such cases, the quote on the side of the imbalance must match (“touch”) the prior sale price. Once a quotation has been gapped, it should

<sup>4</sup> The Exchange filed Information Memo 94–32 in File No. SR–NYSE–93–48. See Securities Exchange Act Release No. 34303 (July 1, 1994), 59 FR 35157 (July 8, 1994).

<sup>5</sup> See NYSE Floor Official Manual at page 38.

<sup>6</sup> All other procedures and requirements set forth in NYSE Information Memo 94–32 and File No. SR–NYSE–93–48 remain unchanged and in effect. See Securities Exchange Act Release No. 34303 (July 1, 1994), 59 FR 35157 (July 8, 1994). Telephone conversation between Jeffery Rosenstock, Senior Special Counsel, Market Surveillance-Rule Development, and Kelly Riley, Assistant Director, Division of Market Regulation, Commission, on August 12, 2004.

remain in place for a reasonable time to allow interested parties to respond to the order imbalance. A Floor Governor, Executive Floor Official, or Senior Floor Official oversees and provides input into the gapped quote process.

### Prior Practice

Formerly, the gapped quote procedures provided that the specialist show the size associated with the gapped quotation as 100  $\times$  100 and a senior-level Floor Official determined a reasonable period of time for the gapped quotation to be maintained (generally, not to exceed 5 minutes), to allow for adequate public disclosure and sufficient time to attract contra-side interest.

### New Procedures To Accelerate Price Discovery

In order to provide more useful information and accelerate price discovery, the Exchange is updating the gapped quotation procedures to require that the specialist disseminate a quote size of 100 shares on only one side of the market. Size consistent with the order imbalance is to be shown on the other side, *i.e.*, 100  $\times$  size or size  $\times$  100. The 100-share side represents the specialist’s determination of the price at which the stock would trade if no contra-side interest develops or no cancellations occur as a result of the gapped quotation. This determination takes into account executable orders on the book at better prices than the price of the 100-share bid or offer. The size side represents the extent of the order imbalance, which can represent orders of members in the crowd as well as SuperDot® (“DOT”) orders.

Under the new procedures, when a gapped quotation situation arises, the specialist must:

- Complete all related Display Book reports of transactions that have been consummated to honor the existing firm quotation, and check the status of the order imbalance (to see whether it has increased or decreased);
- Gap the quotation:
  - On the side of the imbalance, make the bid or offer price, as appropriate, touch the last sale; and
  - Show the size of the imbalance in that bid or offer size;
  - On the side opposite the imbalance, show the possible extent of price impact in the bid or offer price, as appropriate; and
  - Make the size on that side of the market one round lot;
- Consult with a Floor Governor, Executive Floor Official, or Senior Floor Official as to how to proceed;

- Promptly contact known contra-side parties; and
- Continue to permit the entry and cancellation of orders in the Display Book.

The procedures provide that a gapped quotation should remain in place for a reasonable time to allow for interested parties to respond to the order imbalance. What constitutes a reasonable time is determined by the unique circumstances of each gapped quotation situation. However, the gapped quotation generally should last at least 30 seconds unless offsetting interest is received earlier, and generally should not exceed two minutes,<sup>7</sup> unless circumstances require otherwise.

The Floor Governor, Executive Floor Official, or Senior Floor Official shall determine whether to:

- Execute the orders immediately;
- Direct the specialist to maintain the gapped quotation beyond 30 seconds, but no more than two minutes, unless circumstances require otherwise, in order to allow time for contra-side interest to develop or cancellations to occur; or
- Halt trading in the stock.

Under Exchange Rule 60(e), as described in Information Memo 03–21 (May 15, 2003), in a situation involving the use of the new gapped quote procedures, specialists will not be required to modify the 100-share side of the quotation to post better priced buy or sell limit orders or add to size during the reasonable gapped quote period.

### Example

At 2:10 P.M., the market in XYZ is \$76.45 bid for 2,000 shares, 5,000 shares offered at \$76.50 with the last sale at \$76.47. The specialist receives a sudden influx of orders through the system and from floor brokers to buy 370,000 shares at the market. The specialist executes a portion of the buy order imbalance against the 5,000 shares offered to honor the firm quote. 5,000 shares at \$76.50 are reported to the consolidated tape

<sup>7</sup> NYSE Rule 123D provides that with respect to a trading halt, a minimum of five minutes must elapse between the publication of the initial indication and the stock’s reopening. In the event that more than one indication was published, the stock may re-open three minutes after the last indication was published, provided that at least five minutes had elapsed from the publication of the initial indication. See NYSE Information Memo 03–5 (February 27, 2003) and Securities Exchange Act Release No. 47104 (December 30, 2002), 68 FR 597 (January 6, 2003) (File No. SR–NYSE–2002–39) (decreasing the minimum number of minutes that must elapse from 10 minutes to 5 minutes for the first indication, and from 5 minutes to 3 minutes for subsequent indications, provided that the minimum 5 minutes has elapsed since the first price indication). The Exchange represents that these time limits guide Floor Officials as to what may be an appropriate duration of a gapped quote.

and the related floor reports are issued. The specialist then gaps the quote, making the market \$76.50 bid for 365,000 shares, 100 shares offered at \$78.00. Note that this gapped quotation meets all of the requirements discussed above. The bid price touches the last sale. The size of the imbalance, which was reduced when the specialist took the offer, is published as the bid size. The offer price indicates the possible extent of the impact of the buy imbalance on the price of the stock. Lastly, the offer size is shown as 100 shares to indicate that there is insufficient interest on the sell side of the market.

#### Autoquote Feature

When the specialist disseminates a 100-share quote on one side of the market (100 × size or size × 100) where the 100-share side represents the specialist's bid or offer, the autoquote feature is temporarily not available on that side of the market for the limited period of the gapped quote. However, the side of the market displaying size will continue to be subject to autoquoting.

#### NYSE Direct+ ("Direct+")

Auto ex orders will continue to trade with and will reduce the size of the side of the market where the imbalance is being shown. Auto ex executions will not take place on the side of the market showing 100 shares.<sup>8</sup>

#### Inappropriate Use of Manual 100-Share Market

The Exchange believes that it would not be appropriate for a specialist to repeat or continue to disseminate the manual 100-share by 100-share market as that could have the effect of not displaying or quoting a limit order (unless executed or cancelled) until after 30 seconds.

Changes to the Exchange's Direct+ facility and market structure may affect the procedures described herein. However, until rule changes are submitted to the Commission for comment and review, and approval and implementation, the procedures described above will remain in place.<sup>9</sup>

<sup>8</sup> Under Exchange Rule 1000(iv), an auto ex order shall receive an immediate, automatic execution against orders reflected in the Exchange's published quotation and shall be immediately reported as NYSE transactions, unless, with respect to a single-sided auto ex order, the NYSE's published bid or offer is 100 shares.

<sup>9</sup> The Commission notes that the NYSE filed a proposal to change its Direct+ facility and market structure, which was published for comment in the **Federal Register** on August 16, 2004. See Securities Exchange Act Release No. 50173 (August 10, 2004), 69 FR 50407 (August 16, 2004) (File No. SR-NYSE-2004-05).

The new procedures on gapping the quote are described in Information Memo 04-27, which has been sent to all members and member organizations.<sup>10</sup>

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,<sup>11</sup> in general, and furthers the objectives of section 6(b)(5) of the Act,<sup>12</sup> in particular, in that it is designed to promote just and equitable principles of trade and to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, according to the Exchange, is not designed to permit unfair discrimination between customers, brokers, or dealers, or to regulate by virtue of any authority matters not related to the administration of the Exchange.

#### 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

Written comments were neither solicited nor received with respect to the proposed rule change.

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

Because, the foregoing proposed rule change (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms, does not become operative until 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, and the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission, it has become effective pursuant to section 19(b)(3)(A) of the

<sup>10</sup> The Commission notes that the proposed rule change was not effective until filed with the Commission on July 2, 2004.

<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(5).

Act<sup>13</sup> and Rule 19b-4(f)(6) thereunder.<sup>14</sup>

The NYSE has requested that the Commission waive the 30-day operative delay. The Commission believes waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Acceleration of the operative date will allow the Exchange to transition to the new gapped quoting procedures, which provide more information regarding imbalances, without delay. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>15</sup> At any time within 60 days of the filing of this proposed rule change, the Commission may summarily abrogate such 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. 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](mailto:rule-comments@sec.gov).

##### 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-NYSE-2004-37. 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

<sup>13</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>14</sup> 17 CFR 240.19b-4(f)(6).

<sup>15</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. 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-NYSE-2004-37 and should be submitted on or before September 21, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. E4-1979 Filed 8-30-04; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50231; File No. SR-PCX-2004-70]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Exchange, Inc. Relating to the PCX Equities, Inc.'s Ability To Waive an Examination Requirement for an ETP Applicant

August 23, 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 August 4, 2004, the Pacific Exchange, Inc. ("PCX" or "Exchange"), through its wholly-owned subsidiary PCX Equities, Inc. ("PCXE"), filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I and II below, which Items have been prepared by the PCX. 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 is proposing to adopt a rule permitting the Exchange to waive the examination requirement for an Equity Trading Permit ("ETP") applicant if the applicant can show that an appropriate basis exists for waiving this requirement. The text of the proposed rule change is as follows:

New text is *italicized*; deleted text is in [brackets].

#### Rules of PCX Equities, Inc.

##### Rule 2

##### Equity Trading Permits

##### Denial of or Conditions to ETPs

Rule 2.4(b) (1-9)—No change.

(10) does not successfully complete [such written proficiency] examinations as required by the Corporation to [enable it to examine and] verify the applicant's qualifications to function in [one or more of the] capacities covered by the application [applied for];

##### Series 7 Requirement

(A) Traders of ETP Holders for which the Corporation is the Designated Examining Authority ("DEA") must successfully complete the *Series 7 Examination*. [General Securities Registered Representative Examination (Test Series 7), if the primary business of the ETP Holder involves the trading of securities that is unrelated to the performance of the functions of a registered Market Maker. Unless required to complete the Series 7 under Rule 7.21(b)(2), the following are exempt from the requirement to successfully complete the Series 7 Examination:] ETP Holders [who are] performing the function of a registered Market Maker [(pursuant to Rule 7.21(b)(2))] are exempt from this requirement.

For purposes of this Rule:

(i) The term "trader" means a person (a) Who is directly or indirectly compensated by an ETP Holder, or who is any other associated person of an ETP Holder and (b) who trades, makes trading decisions with respect to, or otherwise engages in the proprietary or agency trading of securities. [; and (ii) The term "primary business" means greater than 50% of the ETP Holder's business.

(B) Each ETP Holder for which the Corporation is the DEA must complete, on an annual basis, and on a form prescribed by the Corporation, a written attestation as to whether the ETP Holder's primary business is conducted in the performance of the function of a

registered Market Maker (pursuant to Rule 7).]

[(C)] (B) The requirement to complete the Series 7 Examination will apply to current traders of ETP Holders that meet the criteria of subsection (A), above, as well as to future traders of ETP Holders that meet the criteria of subsection (A), above, at a later date. Traders of ETP Holders that meet the criteria of subsection (A), above, at the time of SEC approval of this Rule, must successfully complete the Series 7 Examination within six months of notification by the Corporation.

Rule 2.4(b) (11-13)—No change.

(c) The Corporation may waive or modify a required examination for any Trader who has been a member of a self regulatory organization within six months of applying for trading privileges under an ETP if appropriate basis for an exemption from a required examination exists based on the following standards of evidence regarding an applicant's qualifications: [for any applicant if, within two years of the date of such applicant applied to the Corporation for an ETP, such applicant has successfully completed a comparable examination administered by a self-regulatory organization or the Securities and Exchange Commission.]

(1) length and quality of securities industry experience or professional experience in investment related fields;

(2) specific registration requested by the applicant and type of business to be conducted in relation to the applicant's experience;

(3) previous registration history with the Corporation and nature of any pre-existing regulatory matters; and

(4) other examinations (e.g. Series 1 Examination) taken by the applicant that may be acceptable substitutes in conjunction with securities industry experience.

Within fifteen calendar days after the Corporation reviews a request for a waiver of the examination requirement, the Corporation shall provide the applicant with a written determination of whether the waiver was granted or denied. If the Corporation denies the request for a waiver, the notice shall include a statement with the reasons for the denial. An applicant whose request for a waiver is denied may appeal the decision of the Corporation in accordance with the terms and conditions of Rule 10.13.

Rule 2.4(d-f)—No change.

\* \* \* \* \*

<sup>16</sup> 17 CFR 200.30-3(a)(12).

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

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