

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51791; File No. SR-PCX-2005-22]

### Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Use of a Third Party to Maintain a Member's Books and Records

June 6, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 under the Act,<sup>2</sup> notice is hereby given that on May 18, 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, II and III below. These 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 Exchange proposes to amend PCX Rule 9.17 and PCX Equities, Inc. ("PCXE") Rule 9.17 to include a provision requiring OTP Holders, OTP Firms, and ETP Holders (collectively, "Holders") to provide the Exchange with a copy of the written undertaking required to be filed with the Commission pursuant to Rule 17a-4(i) under the Act when a third party maintains the Holder's books and records.

The text of the proposed rule change is available on the PCX's Internet Web site (<http://www.pacificex.com>), at the principal office of the PCX, and at the Commission's Public Reference Room.

#### 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 it received on the proposed rule change. The text of these 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 such statements.

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

##### 1. Purpose

The purpose of this proposal is to amend PCX Rule 9.17 and PCXE Rule 9.17 to require a Holder to provide the PCX with a copy of the written undertaking required to be filed with the Commission pursuant to Rule 17a-4(i) under the Act when an outside service bureau maintains the Holder's books and records. Rules 17a-3 and 17a-4 under the Act set forth various provisions that require members of a national securities exchange to make, keep current, and preserve certain books and records. In addition, paragraph (i) of Rule 17a-4 specifies that if such records are prepared or maintained by an outside service bureau, depository, bank, or other recordkeeping service on behalf of the member, such outside entity must file with the Commission a written undertaking, signed by a duly authorized person, specifying that the records prepared or maintained for the member are the property of the member, that the records are subject to examination by the Commission or its designee, and that copies of the records shall be promptly furnished upon request to the Commission or its designee.

Currently, PCX Rule 9.17 and PCXE Rule 9.17 provide that OTP Holders, OTP Firms, and ETP Holders shall make and retain all the books and records prescribed by the bylaws and rules of the Exchange, the rules and regulations of the Commission, and any other rules and regulations to which the Holder is subject. Such books and records must be retained for periods as prescribed and shall be made available for inspection by the Exchange. The Exchange proposes to add a provision to PCX Rule 9.17 and PCXE Rule 9.17 to require that if such books and records are prepared or maintained by an outside service bureau, depository, bank or other recordkeeping service on behalf of the Holder, the Holder must provide the Exchange with a copy of the written undertaking required to be filed with the Commission pursuant to Rule 17a-4(i) under the Act for the Exchange's records.

The Exchange believes it is important for the Exchange to receive a copy of the written undertaking to ensure that the Commission was properly notified that the books and records of a member are being maintained by a third party. In addition, by receiving a copy of the written undertaking, the Exchange will have information with respect to the Holders' books and records that is necessary for inspection purposes.

##### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act<sup>3</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>4</sup> in particular, in that it is designed 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 and perfect the mechanisms of a free and open market and to protect investors and the public interest.

#### 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

No written comments were either solicited or received.

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

The proposed rule change is being designated by the Exchange as "non-controversial" pursuant to Section 19(b)(3)(A) of the Act<sup>5</sup> and subparagraph (f)(6) of Rule 19b-4 under the Act<sup>6</sup> because the 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) does not become operative for 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. The PCX provided the Commission with written notice of its intent to file this proposed rule change, along with a brief description and text of the proposed rule change, at least five

<sup>3</sup> 15 U.S.C. 78f(b).

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

<sup>5</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>6</sup> 17 CFR 240.19b-4.

<sup>7</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.

business days prior to the date of filing the proposed rule change, or such shorter time as designated by the Commission.<sup>7</sup> Consequently, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6). Pursuant to Rule 19b-4(f)(6)(iii), the proposed rule change does not become operative for 30 days from the date of filing.

At any time within 60 days of the filing of such 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.<sup>8</sup>

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, 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). Please include File No. SR-PCX-2005-22 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 20549-0609. All submissions should refer to File No. SR-PCX-2005-22. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all electronic 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 filings will also be

available for inspection and copying at the principal office of the PCX and will be available on the PCX's Internet Web site (<http://www.pacificex.com>). 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 No. SR-PCX-2005-22 and should be submitted on or before July 5, 2005.

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. 34-51799; File No. SR-PCX-2005-27]

#### **Self-Regulatory Organizations; Pacific Exchange, Inc.; Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Exchange's Calculation of the National Best Bid or Offer When Another Market Is Disconnected From the Intermarket Option Linkage**

June 7, 2005.

On March 31, 2005, the Pacific Exchange, Inc. ("PCX" or "Exchange"), filed with the Securities and Exchange Commission ("Commission") a proposed rule change 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> to amend its rule regarding the PCX's calculation of the National Best Bid or Offer ("NBBO") when another market is disconnected from the Linkage.<sup>3</sup> On April 19, 2005, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> The proposed rule change, as amended, was published for comment in the **Federal Register** on May 4, 2005.<sup>5</sup> The

<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.

<sup>3</sup> The term "Linkage" means the systems and data communications network that link electronically the options markets to one another for the purpose of sending and receiving Linkage Orders, related confirmations, order statuses and Administrative Messages. See Section 2(14) of the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Linkage Plan").

<sup>4</sup> See Form 19b-4 dated April 19, 2005 ("Amendment No. 1"). Amendment No. 1 replaced and superseded the original filing in its entirety.

<sup>5</sup> See Securities Exchange Act Release No. 51627 (April 28, 2005), 70 FR 23290.

Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act<sup>6</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>7</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>8</sup> which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission believes that it is appropriate for PCX to remove a market's disseminated quote from PCX's calculation of the NBBO when a market is disconnected from Linkage because access to that market's quote is limited during such times. The Commission further believes that the proposed rule establishes an appropriate procedure to notify PCX OTP Holders<sup>9</sup> and OTP Firms<sup>10</sup> of such removal and establishes an appropriate standard for when to resume inclusion of the affected market's quote in PCX's calculation of the NBBO. The Commission also believes that it is consistent with the Act for PCX to move its current provisions for declaring an away market unreliable from PCX Rule 6.87(h)(4) to proposed PCX Rule 6.94(e) because eliminating certain markets' disseminated quotes from PCX's calculation of the NBBO removes such quotes from the applicability of other provisions of PCX Rule 6.94 that relate to the rights and obligations of PCX OTP Holders and OTP Firms in the event of a Trade-Through.<sup>11</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change (SR-PCX-2005-27) as amended, is approved.

<sup>6</sup> 15 U.S.C. 78f.

<sup>7</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> See Exchange Rule 1.1(q).

<sup>10</sup> See Exchange Rule 1.1(r).

<sup>11</sup> A "Trade-Through" is a transaction in an options series at a price that is inferior to the NBBO. See Section 2(29) of the Linkage Plan.

<sup>12</sup> 15 U.S.C. 78s(b)(2).

<sup>7</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>8</sup> 15 U.S.C. 78s(b)(3)(C).