

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

NASD has designated the proposed rule change as "non-controversial" and a rule change that: (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 for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Therefore, the foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A) of the Act<sup>9</sup> and Rule 19b-4(f)(6)<sup>10</sup> thereunder.

Under Rule 19b-4(f)(6)(iii), a proposed "non-controversial" rule change does not become operative for 30 days after the date of filing, unless the Commission designates a shorter time. NASD has requested that the Commission waive the 30-day operative delay so that the proposed rule change will become immediately effective upon filing, since the provisions of IM-2210-4(b) and Rule 3420 are obsolete and no longer applicable. The Commission hereby waives the 30-day operative delay and believes such waiver is consistent with the protection of investors and the public interest.<sup>11</sup> The Commission notes that the relevant provisions of IM-2210-4(b) and Rule 3420 are obsolete and no longer applicable. Accelerating the operative date will allow the NASD to immediately reflect the currently applicable rules in the NASD Manual.

In addition, Rule 19b-4(f)(6) requires the self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of 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. NASD complied with this requirement.

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>12</sup>

### 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). Please include File Number SR-NASD-2004-123 on the subject line.

#### *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-NASD-2004-123. 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 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 NASD. 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-NASD-2004-123 and should be submitted on or before September 9, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

Margaret H. McFarland,

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50190; File No. SR-NSX-2004-09]

### Self-Regulatory Organizations; National Stock Exchange; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 To Amend NSX's SOR and Tape B Market Data Revenue Sharing Programs

August 12, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 28, 2004, National Stock Exchange (the "Exchange" or "NSX") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change, as described in Items I, II, and III below, which Items have been prepared by the Exchange. The NSX filed an amendment to the proposed rule change on August 10, 2004.<sup>3</sup> The Exchange filed the proposal pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>4</sup> and Rule 19b-4(f)(2)<sup>5</sup> thereunder, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

NSX is proposing to amend its specialist operating revenue ("SOR")

<sup>13</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> See letter from James Yong, Senior Vice President ("SVP"), Regulation and General Counsel of the Exchange, to Nancy Sanow, Assistant Director ("AD"), Division of Market Regulation ("Division"), Commission, dated August 9, 2004 and attachment ("Amendment No. 1"). Amendment No. 1 replaced and superceded the original filing in its entirety. In Amendment No. 1, the Exchange provided additional clarification regarding its proposed changes and made a technical correction to the proposed rule text. For purposes of calculating the 60-day abrogation period, the Commission considers the period to have commenced on August 10, 2004, the date the NSX filed Amendment No. 1. See 15 U.S.C. 78s(b)(3)(C).

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>5</sup> 17 CFR 240.19b-4(f)(2).

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(6).

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

<sup>12</sup> See 15 U.S.C. 78s(b)(3)(C).

revenue sharing program set forth in Exchange Rule 11.10(A)(j) as well as its Tape B revenue sharing program set forth in Exchange Rule 11.10(A)(k). NSX will implement the proposed change on July 1, 2004.

The text of the proposed rule change is below.<sup>6</sup> Proposed new language is *italicized*; proposed deletions are in brackets.

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## CHAPTER XI

### Trading Rules

\* \* \* \* \*

#### Rule 11.10 National Securities Trading System Fees

##### A. Trading Fees

(a)–(i) No change.

(j) Revenue Sharing Program. After the Exchange earns total operating revenue sufficient to offset actual expenses and working capital needs, a percentage of all Specialist Operating Revenue (“SOR”) shall be eligible for sharing with Designated Dealers. SOR is defined as operating revenue [which] *that* is generated by specialist firms. SOR consists of transaction fees, book fees, technology fees, and market data revenue [which] *that* is attributable to specialist firm activity. SOR shall not include any investment income or regulatory monies. The sharing of SOR shall be based on each Designated Dealer’s pro rata contribution to SOR *in excess of \$75,000 per quarter*. In no event shall the amount of revenue shared with Designated Dealers exceed SOR. To the extent market data revenue is subject to [year-end] *any* adjustment, SOR revenue may be adjusted accordingly.

(k) Tape “B” Transactions. Except as provided in Paragraph (A)(e)(4) above, the Exchange will not impose a transaction fee on Consolidated Tape “B” securities. In addition, Members will receive a 50 percent pro rata transaction credit of gross Tape “B” revenue; provided that, however, calculation of the transaction credit will be based on net Tape “B” revenues in those fiscal quarters where the overall revenue retained by the Exchange does not offset actual expenses and working capital needs. To the extent market data revenue from Tape “B” transactions is subject to [year-end] *any* adjustment, credits provided under this program may be adjusted accordingly.

<sup>6</sup> The language in Exchange Rule 11.10(A)(k) has been drafted based on the presumption that SR–NSX–2004–08 has already become effective. See Securities Act Release No. 50146 (August 4, 2004), 69 FR 49927 (August 12, 2004) (approving SR–NSX–2004–08).

(l)–(r) No change.

B. No change.

C. No change.

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## 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 the 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 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 is proposing to amend its SOR revenue sharing program to provide that only specialists that contribute more than \$75,000 in quarterly SOR will be eligible to participate in the allocation of the SOR.<sup>7</sup> In addition, the first \$75,000 in quarterly SOR contributed by a specialist will be excluded from the firm’s *pro rata* percentage contribution calculation. Currently, there are no such limitations on SOR participation. In no event will the amount of revenue shared with specialist firms exceed SOR. The Exchange believes that the implementation of this minimum contribution requirement is reasonable and ensures that each member pays an equitable share of the costs associated with operating the Exchange.

Through this filing, NSX is also proposing to make amendments to its SOR revenue sharing program<sup>8</sup> and Tape B market data revenue sharing program<sup>9</sup> to provide that to the extent market data revenue is subject to any adjustments, not just year-end adjustments as the rule text currently provides, credit provided under the respective programs may be adjusted accordingly.

<sup>7</sup> SOR is defined as operating revenue that is generated by specialist firms. SOR consists of transaction fees, book fees, technology fees, and market data revenue attributable to specialist firm activity. SOR does not include any investment income or regulatory monies. Exchange Rule 11.10(A)(j).

<sup>8</sup> Exchange Rule 11.10(A)(j).

<sup>9</sup> Exchange Rule 11.10(A)(k).

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>10</sup> in general, and with Section 6(b)(4) of the Act,<sup>11</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges. The NSX believes the proposed rule change is also consistent with Section 6(b)(5) of the Act<sup>12</sup> in that it is designed to promote just and equitable principles of trade, to 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 Exchange believes that the proposed change will create incentives for members to use the Exchange trading system, thereby increasing competition, which, in turn, will enhance the National Market System.

The Commission notes that, as a national securities exchange, NSX has an obligation to maintain the resources necessary to adequately conduct its surveillance, examination, and other regulatory responsibilities.<sup>13</sup> The Exchange has acknowledged to the Commission that it remains mindful of its regulatory responsibilities and will not compromise those responsibilities by sharing revenue that would more appropriately be used to fund its regulatory responsibilities.<sup>14</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

No written comments were solicited or received in connection with the proposed rule change.

<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> 15 U.S.C. 78f(b)(4).

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

<sup>13</sup> See Securities Exchange Act Release No. 41286 (April 14, 1999), 64 FR 19843, 19844 (April 22, 1999) (reminding the Cincinnati Stock Exchange, Inc., the precursor to the NSX, of its regulatory responsibilities when considering its SOR program).

<sup>14</sup> Telephone conversation between James Yong, SVP, Regulation and General Counsel of the Exchange and Katherine England, AD, Division, Commission, on July 13, 2004 (regarding operation of the Exchange’s SOR program and the need for the Exchange to remain mindful of its regulatory responsibilities).

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

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>15</sup> and subparagraph (f)(2) of Rule 19b-4<sup>16</sup> thereunder, because it involves a member due, fee, or other charge. 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>17</sup>

### 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). Please include File Number SR-NSX-2004-09 on the subject line.

#### 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 No. SR-NSX-2004-09. 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 Exchange. 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-NSX-2004-09 and should be submitted on or before September 9, 2004.

For the Commission by the Division of Market Regulation, pursuant to the delegated authority.<sup>18</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50191; File No. SR-PCX-2004-78]

#### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Exchange, Inc. Relating to Priority and Order Allocation Procedures for PCX Plus

August 13, 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 10, 2004, 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, 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 proposes to amend PCX Rule 6.76 (Priority and Allocation Procedures of PCX Plus) to eliminate the requirement that inbound marketable Broker Dealer orders will route to Floor Broker Hand Held Terminals in some trading scenarios in lieu of receiving immediate electronic executions. The Exchange also proposes to eliminate Electronic Book Execution pursuant to

PCX Rule 6.76(b)(4). Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in [brackets].

#### Rule 6

##### Options Trading

\* \* \* \* \*

##### Priority and Order Allocation Procedures

Rule 6.76. The rules of priority and order allocation procedures set forth in this Rule 6.76 will apply to option issues designated by the Exchange to be traded in PCX Plus. The maximum size of an inbound order that may be eligible for execution on PCX Plus pursuant to Rule 6.76(b) ("the Maximum Order Size") will be initially established by the LMM in the issue, subject to the approval of the Exchange. Any request by the LMM for changes to the Maximum Order Size must be accompanied by a verified statement indicating the business reason for the change and the estimated duration of such change. Such requests must be approved by two Floor Officials, whose approval must be further ratified by the Exchange. An LMM is prohibited from requesting changes to the Maximum Order Size in order to manipulate the operation of PCX Plus or for any anti-competitive purposes.

(a)—No Change.

(b) PCX Plus Executions. This subsection (b) addresses situations in which orders or Quotes with Size are executed through PCX Plus.

(1) An inbound order that is marketable will be immediately executed against bids and offers in the Consolidated Book, unless [one of the following conditions applies:]

[(A)] the size of the inbound order exceeds the Maximum Order Size established pursuant to Rule 6.76.; or

(B) the inbound order is for the account of a Firm or Non-OTP Holder or OTP Firm Market Maker and more than 50% of the aggregate trading interest in the Consolidated Book at the execution price is for the account (or accounts) of Public Customers.]

If *it does exceed the maximum order size*, [the conditions specified in subsections (A) or (B) above apply.] the order will be represented in the trading crowd pursuant to Rule 6.76(d).

(2) An inbound order will be either fully or partially executed as follows:

(A) If more than 40% of the size in the Consolidated Book is comprised of a single Firm or Non-OTP Holder or OTP Firm Market Maker order at the price at which the inbound order would trade[, and such Firm or Non-OTP Holder or

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

<sup>16</sup> 17 CFR 240.19b-4(f)(2).

<sup>17</sup> See 15 U.S.C. 78s(b)(3)(C). See also footnote 3, *supra* (regarding calculation of the abrogation period).

<sup>18</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.