

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49737; File No. SR-PCX-2004-36]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Relating to Exchange Fees and Charges

May 19, 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 April 19, 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 the Exchange has prepared. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. 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 the Trade-Related Charges portion of its Schedule of Fees and Charges in order to modify applicability of the broker-dealer transaction fee. Below is the text of the proposed rule change, as amended. Proposed new language is in *italics*.

\* \* \* \* \*

#### SCHEDULE OF FEES AND CHARGES FOR EXCHANGE SERVICES

##### PCX OPTIONS: TRADE-RELATED CHARGES

##### TRANSACTIONS

Customer: \$0.00 per contract side

Firm: \$0.10 per contract side for customer facilitation

Broker/Dealer: \$0.21 per contract side \*

*\* This fee will not apply to the transactions where a broker dealer: (i) Is obligated to log onto the Auto-Ex wheel and satisfy Auto-Ex transactions at a price set by another broker dealer, and (ii) immediately offsets that Auto-Ex position to the member of the trading*

*crowd who directed that the bid (offer) be disseminated and available for execution on Auto-Ex.*

\* \* \* \* \*

#### 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 had 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 charges a standard rate of \$0.21 per contract side for transactions executed by broker-dealers on the Exchange. The Exchange also offers performance incentives tied to market share and may adjust the transaction fee to a sum between \$0.05–\$0.21 per contract side depending upon the quality of a broker-dealer’s performance. The Exchange applies a transaction fee to all transactions, regardless of whether they occur automatically or manually.

The Exchange proposes to amend its Schedule of Fees and Charges in order to exclude certain transactions from the applicability of the transaction fee. Specifically, the Exchange proposes not to apply the fee to a transaction where the broker-dealer: (i) Is obligated to log onto the Auto-Ex wheel and satisfy Auto-Ex transactions at a price set by another broker-dealer and (ii) immediately offsets<sup>5</sup> that Auto-Ex position to the member of the trading crowd who directed that the bid (offer) be disseminated and available for execution on Auto-Ex. The Exchange believes that the proposed exclusion is equitable given that the executing

<sup>5</sup> The PCX confirmed that, if the broker-dealer who is obligated to log onto the Auto-Ex wheel and satisfy the Auto-Ex transaction at a price set by another broker-dealer does not offset that Auto-Ex position immediately, then such broker-dealer will not be entitled to receive the fee exclusion for the offset transaction. See telephone conversation among Mai S. Shiver, Acting Director/Senior Counsel, PCX; Susie Cho, Special Counsel, Division of Market Regulation (“Division”), Commission; and David Hsu, Attorney, Division, Commission, on May 17, 2004.

broker-dealer effects the transaction because of its obligation to log onto the Auto-Ex wheel and is entitled to hold the crowd market maker to his or her quote and offset the Auto-Ex position by trading with the crowd market maker (who set the price).<sup>6</sup>

###### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>7</sup> in general, and Section 6(b)(4) of the Act,<sup>8</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members.

##### 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

The Exchange neither solicited nor received written comments with respect to the proposed rule change.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>9</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder<sup>10</sup> because it establishes or changes a due, fee, or other charge imposed by the Exchange. 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.

<sup>6</sup> The PCX has represented that (i) it will surveil for the situation in which the member of the trading crowd who directed that the bid (offer) be disseminated and available for execution on Auto-Ex also is the counterparty to the Auto-Ex trade and (ii) it will inform the Division of the number of such trades that occur in the six months following the effective date of the proposed rule change. See telephone conversation among Mai S. Shiver, Acting Director/Senior Counsel, PCX; Kim St. Hilaire, Vice President Strategic Marketing, PCX; Susie Cho, Special Counsel, Division, Commission; and David Hsu, Attorney, Division, Commission, on May 17, 2004.

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(4).

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

<sup>10</sup> 17 CFR 240.19b-4(f)(2).

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

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

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

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

#### 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-PCX-2004-36 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-PCX-2004-36. 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 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-PCX-2004-36 and should be submitted on or before June 16, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

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

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<sup>11</sup> 17 CFR 200.30-3(a)(12).

#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49748; File No. SR-Phlx-2004-34]

#### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule by the Philadelphia Stock Exchange, Inc. Relating to the Rescission of Commentary .01(f) to Exchange Rule 708

May 20, 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 May 11, 2004, the Philadelphia Stock Exchange, Inc. ("Phlx" 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 Phlx. 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 Phlx proposes to rescind Commentary .01(f) to Exchange Rule 708 (Acts Detrimental to the Interest or Welfare of the Exchange). The text of the proposed rule change is set forth below. Proposed new language is in *italics*, and proposed deletions are in [brackets].

\* \* \* \* \*

#### Rule 708. Acts Detrimental to the Interest or Welfare of the Exchange

A member, member organization, or person associated with or employed by a member or member organization shall not engage in acts detrimental to the interest or welfare of the Exchange.

*Commentary:*

.01 Acts which could be deemed detrimental to the interest or welfare of the Exchange include, but are not limited to, the following:

(a) Conviction or guilty plea to any felony charge or any securities or fraud-related criminal misconduct;

(b) Use or attempted use of unauthorized assistance while taking any securities industry or Exchange-related qualification examination;

(c) Failure to make a good faith effort to pay any fees, dues, fines or other monies due and owing to the Exchange;

(d) Destruction or misappropriation of Exchange or member property; or

(e) Misconduct on the trading floor, in violation of the Exchange's Order and

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

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

Decorum Regulations, that is repetitive, egregious or of a publicly embarrassing nature to the Exchange.

[(f) Any action by a member of the Board of Governors or any Exchange Committee, or by any member organization associated with such member, which contravenes the Seat Transaction Policy contained in Article V of the Code of Conduct for Governors and Committee Members.]

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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 Phlx 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 Phlx 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 the proposed rule change is to rescind Commentary .01(f) to Exchange Rule 708 because this comment has been made obsolete as a result of the demutualization of the Exchange.<sup>3</sup>

Currently, Commentary .01(f) to Phlx Rule 708 provides that acts detrimental to the interest or welfare of the Exchange include, but are not limited to, any action by a member of the Board of Governors or any Exchange Committee, or by any member organization associated with such member, which contravenes the Seat Transaction Policy contained in Article V of the Code of Conduct for Governors and Committee Members. Ownership in the Exchange is no longer represented through seats but rather shares of stock in the Exchange. Therefore, due to the elimination of the concept of seat ownership, the Seat Transaction Policy in Commentary .01(f) to Rule 708 is obsolete.

##### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>4</sup> in general, and furthers the

<sup>3</sup> See Securities Exchange Act Release No. 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR-Phlx-2003-73).

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