

and advisory services based on the particular facts and circumstances in the arrangements. The Commission believes that it is within NASD's discretion to delete this exception and to continue to review such acquisitions based on the particular facts and circumstances.

#### E. Lock-Up Restriction

Under the proposal, common or preferred stock, options, warrants, and other equity securities of the issuer that are unregistered and acquired by an underwriter and related person within 180 days before the filing of the registration statement, or acquired after the filing of the registration statement and deemed to be compensation by NASD, would be subject to a 180-day lock-up. The proposed lock-up also would prohibit certain derivative transactions.<sup>25</sup> In addition, the proposal contains several exceptions to the lock-up restriction for transfers of securities, including, but not limited to, transfers of securities that are not considered to be an item of value, transfers by operation of law or reorganization of the issuer, and transfers of securities that were previously, but no longer are, subject to a lock-up restriction in connection with a prior public offering.

Under the original version of the proposal, a 180-day lock-up restriction would have applied to all equity securities of the issuer that are held by any underwriter and related person at the time of effectiveness of the public offering, unless the securities or transaction complied with an exception. In response to comments, NASD determined to limit the 180-day lock-up to unregistered equity or convertible-to-equity securities and certain derivatives held by underwriters and related persons and acquired during the Review Period. Despite contrary views of commenters, NASD determined to retain the lock-up provision in connection with secondary offerings. However, the proposal would provide an exception from the lock-up restrictions for Rule 144A securities acquired after the completion of the issuer's IPO. In addition, in response to comments, NASD is proposing to amend the proposed rule change to clarify that members may participate in public offerings in which the members, their affiliates or associated persons are offering their shares or are selling security-holders of another issuer.

<sup>25</sup> However, as discussed above, debt securities and derivative instruments (1) that are not items of value, or (2) that are eligible for the limited filing requirement in NASD Rule 2710(b)(6)(A)(iv) and have not been deemed to be underwriting compensation by the Department under the Rule will not be subject to the lock-up.

NASD has stated that it intended to permit such participation, but the prior version of the proposal was unclear.

The Commission believes that the proposed lock-up restrictions, and exceptions thereto, are reasonably designed to protect the aftermarket in a new security from the potential for fraud and manipulation that exists when a member is an underwriter, actively trades the securities, and is a selling security-holder. The Commission further believes that the proposed prohibition against any hedging, short sale, derivative, put, or call transaction that would result in the effective economic disposition of the securities should help to prevent circumvention of the lock-up restrictions.

#### F. Exemptive Authority

Under the proposal, the NASD has retained the ability to grant exemptions from any provision of the Rule, if such exemption is consistent with the purposes of the Rule, the protection of investors, and the public interest. The Commission believes that this exemptive authority is reasonable and should give NASD the authority to exempt transactions that, although covered by the Rule, the Rule was not intended to address.

The Commission finds good cause for accelerating approval of Amendment Nos. 6, 7, 8, 9, and 10. The Commission notes that the proposed rule change has been previously published twice for comment.<sup>26</sup> Amendment Nos. 6 through 10 respond to the concerns previously raised by commenters and make certain technical corrections to the proposed rule change. Accordingly, the Commission finds that good cause exists, consistent with Sections 15A(b)(6) of the Act,<sup>27</sup> and Section 19(b)(2) of the Act<sup>28</sup> to accelerate approval of Amendment Nos. 6 through 10 to the proposed rule change prior to the thirtieth day after publication in the **Federal Register**.

#### V. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment Nos. 6 through 10, including whether the amendments are 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

<sup>26</sup> See *supra* notes 6 and 10.

<sup>27</sup> 15 U.S.C. 78o-3(b)(6).

<sup>28</sup> 15 U.S.C. 78s(b)(2).

address: [rulecomments@sec.gov](mailto:rulecomments@sec.gov). All comment letters should refer to File No. SR-NASD-00-04. 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 NASD. All submissions should refer to File No. SR-NASD-00-04 and should be submitted by January 21, 2004.

#### VI. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>29</sup> that the proposed rule change (SR-NASD-00-04), as amended, is approved, and Amendment Nos. 6 through 10 are approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>30</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 03-32183 Filed 12-30-03; 8:45 am]

BILLING CODE 8010-01-P

#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48976; File No. SR-PCX-2003-68]

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

December 23, 2003.

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 December 16, 2003, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission

<sup>29</sup> 15 U.S.C. 78s(b)(2).

<sup>30</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”) 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 Exchange is proposing to amend the Trade-Related Charges portion of its Schedule of Fees and Charges (“Schedule”). The text of the proposed rule change is available at the Office of the Secretary, the PCX, and at 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 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 Exchange is proposing to amend the Trade-Related Charges portion of its Schedule in order to create an incentive program for Market Makers with respect to transaction charges. Currently, Market Maker transactions are assessed a charge of \$0.21 per contract side for all issues regardless of market share or Top 120 designation. As part of its ongoing effort to secure existing volumes and attract higher levels of liquidity, the PCX is proposing to adopt a three-tiered rate schedule that would lower transaction charges for Market Makers (including Lead Market Makers) as the Exchange attains higher levels of market share on individual issues.<sup>3</sup>

Specifically, the incentive program would lower marginal transaction costs on an issue-by-issue basis for those underlying symbols that the PCX attained market share beyond certain tiers. The three-tiered system is based on the percentage of market share attained for each issue and whether the

issue is designated as a Top 120. The table below shows the marginal Market Maker transaction rates for Top 120 Issues:

Market share tiers	Marg rate
0.00% to 11.00% .....	\$0.21
11.00% to 20.00% .....	0.11
20.00% to 100.00% .....	.....

Under the proposed rate schedule, the rates would be applied based on market share at the end of the trade month. The PCX proposes that these Market Maker transaction rates would be assessed in a fair and equitable manner to ensure that all Market Makers trading in a particular issue receive the same rate incentives. Accordingly, a Top 120 issue that had 1,000,000 contracts in national volume and a 30% PCX market share (or 300,000 PCX contracts) would be billed in the following manner. The first 11% in market share would be billed at a transaction rate of \$0.21 per contract (11% × 1,000,000 × \$0.21=\$23,100). The next 9% in market share would be billed at a transaction rate of \$0.11 per contract (9% × 1,000,000 × \$0.11 = \$9,900). The final 10% in market share would be billed at a transaction rate of \$0.00. The net effective rate on said issue would be \$0.11 per contract (total transaction charges/total PCX market maker contracts or \$33,000/300,000 contracts). All Market Makers would receive the same rate incentive because all Market Maker volumes in that issue would be charged the same effective rate: \$0.11 per contract.<sup>4</sup>

Rates for issues that are not in the Top 120 in terms of national volume will still benefit from the rate incentive, albeit employing a different set of marginal rates. The table below summarizes those marginal transaction rates for Market Makers:

Market share tiers	Marg rate
0% to 15% .....	\$0.21
15% to 25% .....	0.15
25% to 100% .....	0.05

Using the previous example, an issue that was not in the Top 120 but had the same contract volumes would receive the following billing treatment. The first 15% in market share would be billed at a transaction rate of \$0.21 per contract (15% × 1,000,000 × \$0.21=\$31,500). The

<sup>4</sup> For purposes of simplicity, this example assumes that all PCX contracts were executed by Market Makers. In the event this was not the case, for example, the Exchange had the same contract volumes but 100,000 contracts were customer contracts and 200,000 Market Maker contracts, Market Makers would still receive the same rate incentive: \$0.11 per Market Maker contract.

next 10% in market share would be billed at a transaction rate of \$.15 per contract (10% × 1,000,000 × \$0.15 = \$15,000). The final 5% in market share would be billed at a transaction rate of \$0.05 (5% × 1,000,000 × \$0.05 = \$2,500). The net effective rate on said issue would be \$0.1633 per contract (\$49,000 in charges divided by 300,000 contracts). The PCX believes all Market Makers would receive the same rate incentive because all Market Maker volumes in that issue would be charged at the same effective rate: \$0.1633 per contract. Singly listed issues would continue to be billed at the current flat Market Maker transaction rate of \$0.21 per contract.

The Exchange believes that the incentive program will help the PCX attract higher levels of liquidity and therefore enable the PCX to compete aggressively with other market centers. Moreover, the PCX believes the incentive program provides for a natural means of attracting more crowd participation on the trading floor. The incentive program will apply equally to issues traded on the POETS and the PCX Plus trading platforms.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of section 6(b) of the Act.<sup>5</sup> Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(4) requirements that the rules of the exchange provide 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*

Written comments on the proposed rule change were neither solicited nor received.

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

The foregoing proposed rule change has become effective pursuant to section

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

<sup>3</sup> The Exchange states that transaction charges will not change for Customer, Firm or Broker/Dealer transactions.

19(b)(3)(A)(ii) of the Act<sup>6</sup> and Rule 19b-4(f)(2)<sup>7</sup> thereunder, because it establishes or changes a due, fee, or other charge imposed by the Exchange. Accordingly, the proposal will take effect upon filing with the Commission. 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.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal 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. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-PCX-2003-68. 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 hardcopy 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 the PCX. All submissions should refer to File No. SR-PCX-2003-68 and should be submitted by January 21, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 03-32175 Filed 12-30-03; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48983; File No. SR-Phlx-2003-80]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. To Revise Its Schedule of Dues, Fees and Charges To Provide a Rebate for Certain Trades Executed Pursuant to a Dividend Spread Strategy

December 23, 2003.

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 December 15, 2003, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") submitted to 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 Commission is publishing this notice to solicit comments on the proposed rule change.

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

The Phlx proposes to amend its schedule of dues, fees and charges to provide a rebate for certain trades executed pursuant to a dividend spread strategy.<sup>3</sup> The proposed rebate would be effective for trades clearing on and after December 17, 2003.

The schedule of dues, fees and charges is available at the Office of the Secretary, the Phlx, and at 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.

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

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

<sup>3</sup> A "dividend spread" is any trade done within a defined time frame in which a dividend arbitrage can be achieved between any two (2) deep-in-the-money options.

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

##### 1. Purpose

The Exchange states that the purpose of the proposed rule change is to amend the Exchange's schedule of dues, fees and charges to adopt a rebate for certain contracts executed in trades occurring as part of a dividend spread strategy. Specifically, for those options contracts executed pursuant to a dividend spread strategy by member registered options traders ("ROT") and options specialists who have not elected to have the specialist unit fixed monthly fee ("non-fixed specialists")<sup>4</sup> be applicable on the business day before the underlying stock's ex-date,<sup>5</sup> the Exchange would rebate \$0.08 per contract side for ROT executions and \$0.07 per side for non-fixed specialists executions. The proposed rebate would be effective for trades clearing on and after December 17, 2003.

The Exchange's billing system is unable to distinguish between dividend spreads and other types of trades. The Exchange has therefore developed a manual procedure to implement the proposed rebate. Specifically, within thirty calendar days of the billing period (*i.e.*, within thirty days from the issue date of the invoice) for these transactions, a Fee Reimbursement Form, including the appropriate documentation, must be completed and submitted to the Exchange. After the appropriate verification and subsequent acceptance, the Exchange would credit the appropriate member's account for the amount of the rebate (*i.e.*, either \$0.08 or \$0.07 per contract side) charged on contracts executed in trades occurring as part of a dividend spread strategy.

The Exchange states that the primary reason for this fee is to create a cost effective environment for a dividend spread strategy to be executed. By keeping fees low, the Exchange believes that this program should encourage specialists and registered options traders to provide liquidity for these

<sup>4</sup> Specialist units that have been active trading equity and index option books in the capacity of a specialist unit for at least one year from September 1, 2002 may elect to pay a fixed monthly charge as described in the Exchange's fee schedule. A specialist unit may, by the 15th day of the billing month, select the fixed monthly fee methodology for subsequent months, which would be continued until February 29, 2004. See Securities Exchange Act Release No. 48459 (September 8, 2003), 68 FR 54034 (September 15, 2003).

<sup>5</sup> The ex-date is the date on or after which a security is traded without a previously declared dividend or distribution. After the ex-date, a stock is said to trade ex-dividend.

<sup>6</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>7</sup> 17 CFR 240.19b-4(f)(2).

<sup>8</sup> 17 CFR 200.30-3(a)(12).