

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.³⁰

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47388; File No. SR-PCX-2003-01]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by the Pacific Exchange, Inc. Relating to Determination of Top 120 and 250 Issues

February 21, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 27, 2003, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the PCX. The Exchange filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ 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

PCX proposes to amend PCX Rule 6.37(b)(5), PCX Rule 6.87(b), the PCX Schedule of fees, and RBO 02-08 in order to change the calculation period for determining the top 120 and top 250 issues. The text of the proposed rule change is available for inspection and copying in the Commission's Public Reference Room and at the principal office of the PCX.

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

In evaluating the type and quality of issues traded on the Exchange, the Exchange ranks issues based upon the total national volume. A common benchmark that the Exchange uses is called "top 120" and "top 250," indicating that equity option issues falling within these groups would qualify as being among the top 120 or top 250, respectively, of the most actively-traded equity option issues. Because the Exchange relies on the top 120 and top 250 rankings with respect to many of its processes, it believes it needs to define them in such a way as to provide greater accuracy and meaning to the point of reference. Currently, the Exchange defines "top 120" as:

for each current month, the Exchange's determination of whether an equity option ranks in the top 120 most active issues will be based on volume statistics for the one month of trading activity that occurred two months prior to the current month.

The Exchange determines the top 250 rankings in the same manner. Accordingly, the current approach would use September's national equity option volumes to determine November's rankings.

The Exchange represents that it has observed that volumes fluctuate from month to month and as a result, an issue may fall out of, or into, the top 120 or top 250 ranking somewhat sporadically. Moreover, the Exchange believes that evaluating the option volumes over a one-month period does not provide great accuracy in determining the long-term performance of an issue and its rank. Accordingly, the Exchange proposes to adopt a trailing three-month average, starting with the most currently completed calendar month, in order to determine the rankings of issues. For

example, under the proposed rule change, the Exchange would determine its November ranking in October and base the ranking on the national volumes of the September, August and July trade months. Consistently, it would determine its December ranking in November and base it on the October, September and August national volumes.

2. Statutory Basis

The Exchange believes that the proposal is consistent with section 6(b) of the Act,⁵ in general, and furthers the objective of section 6(b)(5),⁶ in particular, because it is designed to promote just and equitable principles of trade, to remove impediments and to perfect the mechanism of a free and open market and a national market system, and in general, 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 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 PCX represents that it submitted a draft of this filing, including the proposed new rule text, to the Commission on January 9, 2003 in fulfillment of the five-day draft notice period of Rule 19b-4(f)(6).⁷ The PCX has further designated that 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 after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Therefore, the proposed rule change has become effective immediately upon filing with the Commission pursuant to section

³⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6). The PCX requests that the Commission waive the 30-day operative delay. The PCX provided the Commission with notice of its intention to file this proposal on January 9, 2003.

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(5).

⁷ 17 CFR 240.19b-4(f)(6).

19(b)(3)(A) of the Act⁸ and Rule 19b-4(f)(6) thereunder.⁹

A proposed rule change filed under Rule 19b-4(f)(6)¹⁰ does not become operative until 30 days after the date of filing or such shorter time as the Commission may designate if such action is consistent with the protection of investors and the public interest. The PCX has requested that the Commission accelerate the implementation of this proposed rule change so that it may take effect before the 30-day period specified in Rule 19b-4(f)(6)(iii).¹¹ The Commission believes that it is consistent with the protection of investors and the public interest to waive the 30-day period and to designate that the proposed rule change has become operative as of January 27, 2003, the date the PCX filed the proposal with the Commission.¹²

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.

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 20549-0609. 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-2003-01 and should be submitted by March 20, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47378; File No. SR-PCX-2002-20]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 by the Pacific Exchange, Inc. Relating to a Stay of a Committee Action

February 19, 2003.

I. Introduction

On April 9, 2002, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt an interim stay provision in connection with its rules regarding review of committee actions. On December 31, 2002, PCX filed Amendment No. 1 to the proposed rule change.³ The proposed rule change and Amendment No. 1 were published for comment in the **Federal Register** on January 15, 2003.⁴ No comment letters were received on the proposal, as amended. This order approves the proposed rule change and Amendment No. 1.

II. Description of the Proposal

The Exchange's Board of Governors delegates certain powers and duties to committees that administer the provisions of the Constitution and the Rules of the Exchange.⁵ The rules of the Exchange provide that persons aggrieved by committee decisions (other than disciplinary matters) may seek review of the decisions subject to the procedural prerequisite of PCX Rule 11.7 (Hearing and Review of Committee Action). PCX represents that, while the rule does not expressly provide a right to interim relief from committee

decisions, applicants seeking such relief routinely request that the Exchange stay further action pending review. In the absence of an express policy or procedures relating to interim relief, the Exchange has evaluated the merits of stay applications on a case-by-case basis relying upon the guidelines that are used by the Commission in reviewing stay applications of self-regulatory organization actions.⁶ As a consequence of the Exchange's *ad hoc* review, the Exchange believes that applicants are either not aware that they have a right to interim relief or they are not familiar with the criteria that they must satisfy to obtain a stay.

The Exchange proposed to set forth the criteria and procedures necessary to request a stay of committee action. The proposed new Exchange rule will set forth four factors that the Exchange will consider when evaluating the merits of a stay application: (1) Whether there is a likelihood that the applicant will prevail on the merits of the appeal; (2) that without a stay, the applicant is likely to suffer irreparable injury; (3) that it is likely there will not be substantial harm to other parties if the stay is granted; and (4) that the issuance of a stay is likely to serve the interests of the Exchange or an identified public interest.⁷ The Exchange represents that the applicant must prove each of these factors based solely on the evidence and information presented in the application for a stay.

The proposed new Exchange rule will also clarify the procedures that an applicant must satisfy in seeking a stay. The proposed rule specifies that an applicant must pay a \$500 fee in order to request a stay. The fee will be used to cover a portion of Exchange expenses including the allocation of staff time in processing a request for a stay. The proposal also provides that applicants must request a stay by the earlier of ten business days after a committee renders its decision or forty-eight hours before the committee implements action. From time to time, the Exchange represents that it may be required to implement a particular committee decision immediately without leaving sufficient time for an aggrieved party to request a stay of action. According to the Exchange, this situation occurs, for example, when the Exchange must identify a particular Lead Market Maker to trade a new option on the following

⁸ 15 U.S.C. 78s(b)(3)(A).

⁹ 17 CFR 240.19b-4(f)(6).

¹⁰ *Id.*

¹¹ 17 CFR 240.19b-4(f)(6)(iii).

¹² The Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation for the sole purpose of accelerating the operative date of the proposed rule change. 15 U.S.C. 78c(f).

¹³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaced the PCX's original 19b-4 filing in its entirety.

⁴ Securities Exchange Act Release No. 47143 (January 8, 2003), 68 FR 2096.

⁵ See PCX Rule 11.4.

⁶ See 17 CFR 201.401(d); see also Order Preliminarily Considering Whether to Issue Stay *Sua Sponte* and Establishing Guidelines for Seeking Stay Applications, Securities Exchange Act Release No. 33870 (April 7, 1994) ("Commission Order").

⁷ The Exchange represents that it relies on the Commission's guidelines in proposing these factors.