

**SECURITIES AND EXCHANGE COMMISSION**  
**(Release No. 34-50319; File No. SR-PCX-2004-75)**

**September 7, 2004**

**Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Relating to Minimum Terms for Equity Linked Notes (“ELNs”)**

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 4, 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 and II below, which Items have been prepared by the self-regulatory organization. The Exchange has designated the proposed rule change as constituting a “non-controversial” rule change under subparagraph (f)(6) of Rule 19b-4 under the Act,<sup>3</sup> which renders the proposal effective upon receipt of this filing by the Commission.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

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

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

<sup>4</sup> As required by 17 CFR 240.19b-4(f)(6), the Exchange has represented that the proposed rule change will not significantly affect the protection of investors or the public interest, nor will it impose any significant burden on competition. The Exchange also fulfilled its obligation to provide at least five-business days notice to the Commission of its intent to file this proposed rule change by notice on July 29, 2004. The Exchange’s proposed rule changes are similar to the rules regarding the terms of equity-linked debt securities for the American Stock Exchange LLC (“Amex”), the Chicago Stock Exchange, Inc. (“CHX”), and the New York Stock Exchange, Inc. (“NYSE”).

**I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange, through its wholly owned subsidiary PCX Equities, Inc. (“PCXE”), proposes to modify the listing requirement related to the minimum and maximum terms to list Equity Linked Notes (“ELNs”) on PCXE and traded on the Archipelago Exchange (“ArcaEx”), a facility of the PCXE. The PCX proposes to modify the two to seven year term requirement in PCXE Rule 5.2(j)(2) to a minimum one-year term requirement. The PCX also proposes to eliminate the maximum term for ELNs.

Below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in brackets.

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Rules of PCX Equities, Inc.

Rule 5

Listings

\* \* \* \* \*

Equity Linked Notes ("ELNs")

Rule 5.2(j)(2)(A) – No Change.

(B) ELN Listing Standards

(i)(a)-(c) – No change.

(d) [a term of two to seven years] a minimum term of one year [, provided that if the issuer of the underlying security is a non-U.S. company, or if the underlying security is a sponsored ADR, the issue may not have a term of more than three years].

(C) – (E) – 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 self-regulatory organization included statements concerning the purpose of and basis for the proposed modifications to the fee schedule. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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**

ELNs are non-convertible debt of an issuer, whose value is based, at least in part, on the value of another issuer’s common stock or non-convertible preferred stock. PCXE Rule 5.2(j)(2) sets forth the listing criteria applicable to ELNs. PCXE Rule 5.2(j)(2)(B)(i)(d) requires that ELNs have, among other things, a term of two to seven years to be eligible for listing, provided that if the issuer of the underlying security is a non-U.S. company, or if the underlying security is a sponsored American Depositary Receipts, the issue may not have a term of more than three years. The Exchange initially adopted this term requirement as a conservative measure to help ensure that the trading of ELNs did not have an adverse effect on the liquidity of the underlying stock and were not used in a manipulative manner.<sup>5</sup>

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The Amex and the NYSE initially adopted similar term limits for equity-linked debt securities listed on their exchanges. See Securities Exchange Act Release No. 32343 (May 20, 1993), 58 FR 30833 (May 27, 1993) and Securities Exchange Act Release No.

The Exchange proposes to modify the term requirements in Rule 5.2(j)(2)(B)(i)(d) to reduce the minimum term of ELNs, whether the ELN is based on U.S. or non-U.S. securities, to one year, and eliminate the maximum term requirement.<sup>6</sup> All other requirements in Rule 5.2(j)(2) would remain the same.

In recent years, several other self-regulatory organizations that have listing criteria for equity linked debt securities have reduced the minimum term requirement for such securities to one year.<sup>7</sup> The Exchange seeks to make the same modifications in order to provide ELN issuers with a greater choice of listing venues and remove the impediment to listing created by the current stringent term requirements. These modifications would also allow ArcaEx to compete more effectively with other listing venues for listings of ELNs.

The Exchange represents that it has sufficient resources and comprehensive surveillance procedures to identify and deter manipulative and other illicit trading activity in ELNs and securities linked to them. In conducting its surveillance procedures, the Exchange has not found any adverse effects as a result of the trading of ELNs and the securities to which ELNs are linked. Finally, the

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33468 (January 13, 1994), 59 FR 3387 (January 21, 1994), respectively.

<sup>6</sup> The Exchange represents that it will notify the Commission in advance if the Exchange intends to list ELNs of a non-U.S. company issuer and the issue has a term of more than three years.

<sup>7</sup> See Securities Exchange Act Release No. 42313 (January 4, 2000), 65 FR 2205 (January 13, 2000) (CHX reduced the minimum term of eligible equity linked debt securities from two years to one and eliminated maximum term requirement); Securities Exchange Act Release No. 42110 (November 5, 1999), 64 FR 61677 (November 12, 1999) (Amex reduced the minimum term of eligible equity linked debt securities from two years to one and eliminated maximum term requirement); and Securities Exchange Act Release No. 41992 (October 7, 1999), 64 FR 56007 (Oct. 15, 1999) (NYSE reduced the minimum term of eligible equity linked debt securities from two years to one and eliminated maximum term requirement).

Exchange notes that NYSE, Amex, and the CHX have similar rules that reduce the minimum terms for their equity-linked debt instruments to one year and eliminate the maximum term.<sup>8</sup> Accordingly, the Exchange believes it is appropriate to relax the more stringent term requirements set forth in PCXE Rule 5.2(j)(2) by reducing the minimum term for ELNs to one year and eliminating the maximum term limit.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b)<sup>9</sup> of the Act, in general, and furthers the objectives of Section 6(b)(5)<sup>10</sup> in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principals of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system.

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<sup>8</sup> See supra note 7.

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

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 has designated the proposed rule change as one that: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) 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 Exchange has provided the Commission with written notice of its intent to file the proposed rule change, at least five business days prior to the filing date. Therefore, the foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>11</sup> and Rule 19b-4(f)(6) thereunder.<sup>12</sup>

Pursuant to Rule 19b-4(f)(6)(iii) under the Act,<sup>13</sup> the proposal does not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. The PCX has requested that

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> 17 CFR 240.19b-4(f)(6)(iii).

the Commission waive the 30-day operative delay so that the proposed rule change will become immediately effective upon filing on the basis that such rule changes are necessary for the Exchange to compete effectively with other listing venues for listing ELNs. The Exchange has fulfilled its obligation to provide the five-business days notice to the Commission of its intent to file this proposed rule change by notice on July 29, 2004. Therefore, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it conforms the listing criteria for ELNs to those of the Amex, the CHX and the NYSE.<sup>14</sup> Therefore, the Commission has determined to allow the proposed rule change to become effective and operative as of the date of filing with the Commission.<sup>15</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further 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 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

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<sup>14</sup> See supra note 7.

<sup>15</sup> For purposes only of waiving the operative date of this proposal, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-PCX-2004-75 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-PCX-2004-75. 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, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the PCX. 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-2004-75 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>16</sup> 17 CFR 200.30-3(a)(12).