

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-49786; File No. SR-PCX-2004-40)

May 28, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change, and Amendment No. 1 thereto, by the Pacific Exchange, Inc. Relating to Post-Trade Anonymity to its ETP Holders.

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 April 28, 2004, the Pacific Exchange, Inc. (“PCX” or “Exchange”), through its wholly owned subsidiary PCX Equities, Inc. (“PCXE”), submitted to the Securities and Exchange Commission (“Commission” or “SEC”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed Amendment No. 1 to the proposed rule change on May 28, 2004.³ 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

The PCX is proposing to provide post-trade anonymity to its ETP Holders⁴ and to modify PCXE Rule 7.41 accordingly. The text of the proposed rule change is as follows: Proposed rule language is italicized.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Mai S. Shiver, Acting Director/Senior Counsel, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation (“Division”), Commission, dated May 27, 2004 (“Amendment No. 1”). Amendment No. 1 replaces and supercedes the original 19b-4 filing in its entirety.

⁴ See PCXE Rule 1.1(n) (definition of “ETP Holder”).

Rule 7.41, Clearance and Settlement

Rule 7.41. (a) The details of each transaction executed within the Archipelago Exchange shall be automatically processed for clearance and settlement on a locked-in basis. ETP Holders need not separately report their transactions to the Corporation for trade comparison purposes. All transactions effected by a Sponsored Participant shall be cleared and settled, using the relevant Sponsoring ETP Holder's mnemonic (or its clearing firm's mnemonic as applicable).

(b) Except as provided herein, transactions executed on the Archipelago Exchange will be processed anonymously. The transaction reports will indicate the details of the transaction, but will not reveal contra party identities. The anonymity process is not available for Directed Orders.

(c) The Archipelago Exchange will reveal the identity of an ETP Holder or ETP Holder's clearing firm in the following circumstances:

(1) for regulatory purposes or to comply with an order of a court or arbitrator;

(2) when the National Securities Clearing Corporation ("NSCC") ceases to act for an ETP Holder or the ETP Holder's clearing firm; and NSCC determines not to guarantee the settlement of the ETP Holder's trades; or

(3) on risk management reports provided to the contra party of the ETP Holder or ETP Holder's clearing firm each day by 4:00 p.m. (E.S.T.) which disclose trading activity on an aggregate dollar value basis.

(d) The Archipelago Exchange will reveal to an ETP Holder, no later than the end of the day on the date an anonymous trade was executed, when that ETP Holder submits an order that has executed against an order submitted by that same ETP Holder.

(e) In order to satisfy the ETP Holder's record keeping obligations under SEC Rules 17a-3(a)(1) and 17a-4(a), (i) the Archipelago Exchange shall, with the exception of those circumstances described below in (ii), retain for the period specified in Rule 17a-4(a) the identity of each ETP Holder that executes an anonymous transaction described in paragraph (b) of this rule, and (ii) ETP Holders shall retain the obligation to comply with SEC Rule 17-3(a)(1) and 17-4(a) whenever they possess the identity of their contra-party. In either case, the information shall be retained in its original form or a form approved under Rule 17a-6.

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

As part of its continuing efforts to enhance participation on the Archipelago Exchange (“ArcaEx”) facility, the Exchange is proposing to extend anonymity through to

post settlement. Currently, Users⁵ may display and execute orders on an anonymous basis pursuant to PCXE Rules 7.36 and 7.37, respectively. Accordingly, during the execution process, Users' orders are executed without knowledge of the contra-party's identity. At the end of the trading day, the contra-party's identity on a trade-by-trade basis is revealed to ETP Holders for their respective trades through web-based reports.⁶ Therefore, anonymity is maintained through execution, but not through the end-of-day settlement process.

The Exchange proposes to modify PCXE Rule 7.41 to clarify that except as specifically provided, the transactions executed on the Exchange will be processed anonymously and that transaction reports will indicate the details of the transaction, but will not reveal contra party identities.⁷ Rule 7.41 expressly provides that the anonymity process is not available for Directed Orders. In the Directed Order Process as provided in PCXE Rule 7.37, any market or limit order to buy or sell could be directed to a particular

⁵ See PCXE Rule 1.1(yy) for the definition of "User" which includes Sponsored Participants (as defined in PCXE Rule 1.1 (tt)).

⁶ Currently, only the identity of an ETP Holder or the ETP Holder's clearing firm is revealed at the end of the trading day, not the identity of a Sponsored Participant, since Sponsored Participants trade on the Exchange using the Sponsoring ETP Holder's mnemonic. The proposed rule change intends to retain this process, by not revealing the identity of the Sponsored Participant in the limited circumstances where the identity of the contra-party is revealed. Therefore, all references to ETP Holder in the proposed rule would also include trades by Sponsored Participants using the ETP Holder's mnemonic. Footnote added pursuant to telephone conversation between Mai S. Shiver, Acting Director/Senior Counsel, PCX, and Marc McKayle, Special Counsel, Division, Commission, on May 28, 2004.

⁷ Currently, where an Attributed Order on ArcaEx is executed against another Attributed Order, these executions are treated like other orders in that they receive post-trade anonymity until the end of the trading day. Under the proposed rule change, Attributable Orders will continue to be treated like other orders and receive post-trade anonymity through clearance and settlement. Footnote added pursuant to telephone conversation between Mai S. Shiver, Acting Director/Senior Counsel, Regulatory Policy, PCX, and Marc McKayle, Special Counsel, Division, Commission, on May 28, 2004.

market maker as a “Directed Order.” At the present time, Users are not permitted by ArcaEx’s functionality to direct or “preference” orders to ETP Holders. If in the future Users are permitted to direct or preference orders to ETP Holders through ArcaEx, PCX understands that any exemptive relief⁸ provided by the Commission would not apply to ETP Holders engaging directly (or indirectly through a Sponsored Participant) in any such activity.⁹ The Exchange also understands that it would be required to notify the Commission and amend its rules to address the applicability of the anonymity feature to Directed Orders.

As proposed, the Exchange will reveal the identity of an ETP Holder or ETP Holder’s clearing firm¹⁰ in the following circumstances: (1) for regulatory purposes or to comply with an order of a court or arbitrator; (2) when the National Securities Clearing Corporation (“NSCC”)¹¹ ceases to act for an ETP Holder or the ETP Holder’s clearing firm, and NSCC determines not to guarantee the settlement of the ETP Holder’s trades; or (3) on risk management reports provided to the contra party of the ETP Holder or ETP Holder’s clearing firm each day by 4:00 p.m. (E.S.T.) which disclose trading activity on

⁸ In connection with this rule filing, the Commission has granted ETP Holders of the Exchange a limited exemption pursuant to Rule 10b-10(f) under the Act from the requirements in Rule 10b-10(a)(2)(i)(A) to disclose to their customers the name of the person from whom a security was purchased, or to whom it was sold or the fact that such information will be provided upon a customer’s written request. See letter from Brian A. Bussey, Assistant Chief Counsel, Division, Commission, to Mai S. Shiver, Acting Director/Senior Counsel, Regulatory Policy, PCX, dated April 30, 2004.

⁹ It would also not apply if a Sponsored Participant engaged in such activity. Footnote added pursuant to telephone conversation between Mai S. Shiver, Acting Director/Senior Counsel, Regulatory Policy, PCX, and Terri Evans, Assistant Director, Division, Commission, on May 28, 2004.

¹⁰ PCXE Rule 7.14 requires that each ETP Holder either be a clearing firm or clear transactions through a clearing firm. Each ETP Holder has an obligation to disclose the name of the clearing firm to the Exchange.

¹¹ ArcaEx will submit clearing records to NSCC, which, pursuant to its rules (SR-NSCC-2003-14), will report trades executed on ArcaEx back to its clearing firms utilizing the unique clearing number for the contra-party rather than reveal that contra-party’s acronym.

an aggregate dollar value basis. In the event an ETP Holder submits an order that happens to execute against an order submitted by that same ETP Holder, the Exchange will disclose this information to the ETP Holder no later than the end of the day on the date the trade was executed. The Exchange will be able to maintain anonymity with respect to disputed or erroneous trades because the Exchange resolves disputes through a centralized process and conducts the process on behalf of its ETP Holders.¹²

The trade reports that the NSCC receives from ArcaEx for anonymous trades contain the identities of the parties to the trade. This measure enables the NSCC to conduct its risk management functions and settle anonymous trades. The trade report sent to the NSCC will contain an indicator noting that the trade is anonymous. On the contract sheets the NSCC issues to its participants, the NSCC will substitute ANON for the acronym of the contra-party. The purpose of this masking is to preserve anonymity through settlement.

ArcaEx offers ETP Holders additional risk management tools for monitoring their exposure to members with whom they trade on an anonymous basis. First, ArcaEx provides ETP Holders or ETP Holders' clearing firms with intra-day concentration reports that disclose an ETP Holder's aggregate dollar value of purchases and sales with other members with whom it has traded anonymously. Second, ArcaEx will reveal by 4 p.m. Eastern Time the identities of the ETP Holders or ETP Holders' clearing firms listed on the intra-day concentration report. With this information, ETP Holders would know the exact dollar value of their aggregate purchases and sales with individual contra-

¹² See PCXE Rules 7.10 and 7.11 (Revisions of Transactions and Clearly Erroneous Policy). The Exchange represents that revealing a contra-party's identity so that an ETP Holder may pursue its right to arbitrate is consistent with the Exchange's authority under proposed rule PCXE 7.41(c)(1) to reveal a contra-party's identify for regulatory purposes.

parties. Third, once the NSCC ceases to act for a participant, that firm, and any other firm that clears through the participant, would not be able to continue trading. When the NSCC has ceased to act for a participant and determined not to guarantee the settlement of the participant's trades, ArcaEx would coordinate actions with NSCC to suspend the ETP Holder's trading privileges or the trading privileges of all ETP Holders that clear through that particular clearing firm. ArcaEx would promptly disclose to other ETP Holders and clearing firms that the NSCC has ceased to act via an ArcaEx Bulletin disseminated via email and through ArcaEx Clearing Updates disseminated via the ArcaEx's website. ArcaEx would also promptly disclose each trade executed anonymously with the firm that NSCC ceased to act for as well as for any firms clearing through that NSCC participant. Such information would be disclosed through web-based reports.

In order to satisfy the ETP Holder's record keeping obligations under SEC Rules 17a-3(a)(1) and 17a-4, (i) the Exchange shall, with the exception of the stated circumstances above, retain for a period specified in Rule 17a-4(a), the identity of each ETP Holder that executes an anonymous transaction. As proposed, the ETP Holders shall retain the obligation to comply with SEC Rule 17a-3(a)(1) and 17-4(a) whenever they possess the identity of their contra-party. In either case, the information must be retained in its original form or a form approved under Rule 17a-6.

The Exchange believes that post-trade anonymity will benefit investors because preserving anonymity through settlement limits the potential market impact that disclosing the Users' identity may have. Specifically, when the contra-party's identity is revealed, Users can detect trading patterns and make assumptions about the potential

direction of the market based on the User's presumed client-base. By eliminating the User's identity and mitigating market impact, the Exchange believes that it will help Users meet best execution obligations.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)¹³ of the Act, in general, and furthers the objectives of Section 6(b)(5),¹⁴ in particular, because it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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.

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

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(5).

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act,¹⁵ and subparagraph (f)(6) of Rule 19b-4,¹⁶ thereunder because it does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate. At any time within 60 days of the filing of the 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.¹⁷

The PCX has requested that the Commission waive the five-day pre-filing requirement and the 30-day operative delay so that the proposed rule change will become immediately effective upon filing. The Commission believes waiving the five-day pre-filing notice and the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission believes that waiving the pre-filing requirement and accelerating the operative date will permit the Exchange to implement its post trade anonymity feature without undue delay. The Commission notes that it previously approved a proposed rule change providing post-trade anonymity through clearance and settlement and therefore the instant proposed rule change should not raise any new

¹⁵ 15 U.S.C. 78s(b)(3)(A).

¹⁶ 17 CFR 240.19b-4(f)(6).

¹⁷ For the purposes of determining the effective date and calculating the 60-day abrogation period, the Commission considers the proposed rule change to have been filed on May 28, 2004; the date PCX filed Amendment No. 1.

regulatory issues.¹⁸ Accordingly, the Commission designates the proposal to be effective and operative upon filing with the Commission.¹⁹

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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. Please include File Number SR-PCX-2004-40 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-2004-40. 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

¹⁸ See Securities Exchange Act Release No. 48527 (September 23, 2003), 68 FR 56361 (September 30, 2003)(SR-NASD 2003-85).

¹⁹ For the 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. 15 U.S.C. 78c(f).

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 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-2004-40 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.²⁰

Margaret H. McFarland
Deputy Secretary

²⁰ 17 CFR 200.30-3(a)(12).