

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50374; File No. SR-PCX-2004-63)

September 14, 2004

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. Relating to a Proposed Listing Fee Schedule for Exchange Traded Funds and Closed-End Funds

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 August 9, 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 Items have been prepared by the PCX. The PCX submitted Amendment No. 1 to the proposal on September 3, 2004.³ 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 PCX, through its wholly-owned subsidiary PCX Equities, Inc. (“PCXE”), is proposing to amend its Schedule of Fees and Charges (“Schedule”) in order to adopt new listing fees specifically for listing Exchange-Traded Funds (“ETFs”) and Closed-End Funds (“CEFs”) (collectively, “Funds”) on the PCXE and trading on the Archipelago Exchange (“ArcaEx”), a

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Tania Blanford, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated September 1, 2004, and accompanying Form 19b-4 (“Amendment No. 1”). Amendment No. 1 replaced the original filing in its entirety.

facility of the PCXE.⁴ The PCX proposes to implement these fees effective for listings, and listing applications pending, as of June 21, 2004. The text of the proposed rule change appears below; proposed additions are italicized.

* * * * *

SCHEDULE OF FEES AND CHARGES
FOR EXCHANGE SERVICES

PCX EQUITIES: LISTING FEES

Administrative Listing Fees*

Application Processing Fee	\$500.00
<u>Funds</u>	<u>\$500.00 for all applications to list Fund(s)</u> <u>submitted at the same time by a Fund issuer</u> <u>or “family,” regardless of the number of</u> <u>Funds to be listed¹</u>

Company Name Change	\$250.00
Change in Par Value	\$250.00

Original Listing Fees**

Common Stock, dually listed with the NYSE, AMEX or Nasdaq NM	\$10,000.00
Common Stock, not dually listed	\$20,000.00

⁴

ETFs include unit investment trusts, portfolio depository receipts and trust issued receipts designed to track the performance of the broad stock or bond market, stock industry sector, and U.S. Treasury and corporate bonds, among other things. CEFs are a type of Investment Company registered under the Investment Company Act of 1940 that offers a fixed number of shares. Their assets are professionally managed in accordance with the CEF’s investment objectives and policies, and may be invested in stocks, fixed income securities or a combination of both.

Additional Classes of Common Stock	\$2,500.00
Preferred Stock, Warrants, Debit Instruments,	\$2,500.00
Purchase Rights, Units	
<u>Funds</u>	<u>\$20,000 for the first Fund listed by a Fund issuer or “family;” no fee for subsequent additional Funds listed by the same Fund issuer or “family”</u>

* This is a non-refundable, fixed charge for review of listing applications. Issues approved for listing will have this charge credited towards the Original Listing Fee or, if the Fund issuer or “family” is not subject to an original listing fee, towards the applicable annual maintenance fee(s) due for the Fund or Funds listed.

¹ Fund “families” are those with a common investment advisor or investment advisors, which are “affiliated persons” as defined under the securities laws. A “family” also includes trust-issued receipts such as Holding Company Depository Receipts (known as HLDRSSM) that have a common initial depositor or initial depositors that are “affiliated persons” as defined under the securities laws.

** The Initial Listing fees are fixed and are not charged by the number of shares listed.

* * * * *

Additional Shares Listing Fee²

Per share	\$.0025
Minimum charge (per application)	\$500.00
Maximum charge (per application)	\$7500.00
Maximum charge (per year)	\$15,000.00

Annual Listing Maintenance Fee

(Payable January of each year following)

For one issue, dually listed with the NYSE,	\$1,000
AMEX or Nasdaq NM	
For one issue, not dually listed	\$2,000.00
For each additional issue	\$500.00
Minimum (per year)	\$1,000.00
Maximum (per year)	\$5,000.00

For Funds:

<u>Aggregate Total Shares Outstanding</u>	<u>Annual Maintenance Fee</u>
<u>Less than 10 million</u>	<u>\$5,000</u>
<u>10 million to less than 30 million</u>	<u>\$10,000</u>
<u>30 million to less than 50 million</u>	<u>\$15,000</u>
<u>50 million to less than 100 million</u>	<u>\$20,000</u>
<u>100 million to less than 250 million</u>	<u>\$30,000</u>
<u>250 million to less than 500 million</u>	<u>\$40,000</u>
<u>500 million to less than 750 million</u>	<u>\$50,000</u>
<u>750 million to less than One billion</u>	<u>\$60,000</u>
<u>Greater than One billion</u>	<u>\$80,000</u>

² This fee does not apply to Funds.

* * * * *

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 modifications to the fee schedule. 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 PCX proposes to adopt new listing fees specifically for Funds. The proposed fees include a non-refundable application processing fee, a one-time original listing fee per Fund issuer or “family,”⁵ as defined, and an annual maintenance fee based on the aggregate total shares outstanding of the Funds listed by the same Fund issuer or “family.” The remaining portions of the current Schedule would continue to apply to Funds, except for the additional shares listing fee.

The PCX believes there are several reasons to adopt listing fees specifically for Funds. First, PCXE’s current Schedule does not explicitly provide for listing fees for these types of securities. Accordingly, the PCX believes the amended Schedule would provide guidance and clarity to issuers and the public regarding the appropriate applicable fees for Funds. Second, the PCX believes, in most cases, proposed fees would substantially decrease the listing fees that

⁵

Fund “families” are those with a common investment advisor or investment advisors that are “affiliated persons” as defined under the securities laws. A “family” also includes trust-issued receipts such as Holding Company Depository Receipts (known as HLDRSSM) which have a common initial depositor or initial depositors which are “affiliated persons” as defined under the securities laws.

Fund issuers and Fund “families” would otherwise pay under the current Schedule. As such, the PCX believes the proposed fees would enable PCXE to compete more effectively for listings.

The PCX also believes the lower proposed fees would also be beneficial for issuers. Finally, the PCX believes reduced listing fees for Funds would remove the financial impediment to listing created by high fees, thus providing Fund issuers and Fund “families” with a greater choice of listing venues.

Summary of Current and Proposed Fee Changes

(a) Application Processing Fees

Currently, the Schedule provides for a \$500 application processing fee, which applies generally to all listings applications including Funds. While this fee is non-refundable, it is credited towards the original listing fee upon approval for listing. PCX proposes to create an application processing fee specifically for Funds, which would allow a single application fee of \$500 for applications submitted at the same time by a Fund issuer or Fund “family,” regardless of the number of Funds to be listed. Thus, a Fund issuer or Fund “family” which seeks to list multiple Funds at the same time would incur a total application fee of \$500. Subsequent applications from the same Fund issuer or “family” to list one or more Funds would incur a separate \$500 application fee at that time.

Similar to the general application processing fee, the application processing fee for Funds would be non-refundable and credited towards the original listing fee, if any, upon approval of the listing, or, if the Fund issuer or “family” is not subject to an original listing fee, towards the applicable annual maintenance fee(s) due for the Fund or Funds listed.

(b) Original Listing Fees

Currently, the original listing fee is based on whether a Fund or “family” is dually listed

on the New York Stock Exchange, Inc. (“NYSE”), the American Stock Exchange LLC (“Amex”), or Nasdaq National Market (“NNM”). Thus, if a Fund is dually listed, the original listing fee would be \$10,000 per Fund; otherwise, the original listing fee would be \$20,000 per Fund. This fee would apply to each individual Fund listed, regardless of the timing or number of Funds listed by an individual Fund issuer or “family” of funds.

The PCX proposes a one-time original listing fee of \$20,000 specifically for the first Fund listed by a Fund issuer or Fund “family” – including those with one or more Funds listed as of June 21, 2004 – would not incur an original listed fee, regardless of whether one or more previously listed Funds are no longer listed on PCXE.

This proposed fee would apply regardless of whether the Fund(s) lists in conjunction with an initial public offering, transfers from another marketplace, concurrently lists on another marketplace, or is listed on another exchange or market.

(c) Annual Maintenance Fees

Currently, the annual maintenance fees are fixed and based on whether the Fund is dually listed on the NYSE, Amex, or NNM. If a Fund is dually listed, the maintenance fee would be \$1,000 per Fund; otherwise, the maintenance fee would be \$2,000 per Fund. These fees apply regardless of the number of Funds listed by the issuer. Moreover, annual maintenance fees are not incurred in the year of listing; rather, they are payable beginning in the first full calendar year following the year of listing.

The PCX proposes to adopt annual maintenance fees specifically for Funds based on the aggregate total shares outstanding of the Funds listed by the same Fund issuer or Fund “family,” as follows:

<u>Aggregate Total Shares Outstanding</u>	<u>Annual Maintenance Fee</u>
Less than 10 million	\$5,000
10 million to less than 30 million	\$10,000
30 million to less than 50 million	\$15,000
50 million to less than 100 million	\$20,000
100 million to less than 250 million	\$30,000
250 million to less than 500 million	\$40,000
500 million to less than 750 million	\$50,000
750 million to less than One billion	\$60,000
Greater than One billion	\$80,000

As previously stated, annual maintenance fees would be assessed beginning in the first full calendar year following the year of listing. The aggregate total shares outstanding would be calculated based on the total shares outstanding as reported by the Fund issuer or Fund “family” in its most recent periodic filing with the Commission or other publicly available information. For example, if a single Fund issuer or “family” listed ten Funds during calendar year 2001 with an aggregate of 120 million shares outstanding, and subsequently listed a single Fund in 2002 with 130 million shares outstanding, then listed a single Fund in 2003 with 400 million shares outstanding, that issuer would not incur an annual maintenance fee for 2001, but would incur annual maintenance fees of \$30,000 for 2002 (based on an aggregate of 120 million total shares outstanding), \$40,000 for 2003 (based on an aggregate of 250 million total shares outstanding) and \$50,000 for 2004 (based on an aggregate of 650 million total shares outstanding). Annual maintenance fees would not be pro-rated or reduced for Funds that delist for any reason.

The annual maintenance fees would apply regardless of whether any of these Funds are

listed elsewhere.

(d) Implementation

The PCX proposes that these proposed fees become effective retroactive for all listings, and listing applications pending, as of June 21, 2004.

2. Statutory Basis

The Exchange believes that the proposal, as amended, is consistent with Section 6(b) of the Act,⁶ in general, and Section 6(b)(4) of the Act,⁷ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, 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 Fee Schedule Modifications and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

- A. by order approve the proposed modifications, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

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 e-mail to rules-comments@sec.gov. Please include File No. SR-PCX-2004-63 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-2004-63. 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

20549-0609. 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 No. SR-PCX-2004-63 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.⁸

Margaret H. McFarland
Deputy Secretary

⁸

17 CFR 200.30-3(a)(12).