

**SECURITIES AND EXCHANGE COMMISSION**  
**(Release No. 34-50731; File No. SR-PCX-2004-104)**

**November 23, 2004**

**Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. To Extend for an Additional Six-Month Period a Pilot Rule Relating to Waiver of California Arbitrator Disclosure Standards**

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 October 25, 2004, 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 self-regulatory organization. The PCX filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> 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

The PCX and its wholly owned subsidiary PCX Equities, Inc. (“PCXE”) are proposing to extend the pilot rule in PCX Rule 12.1(i) and PCXE Rule 12.2(h), which requires industry parties in arbitration to waive application of contested California arbitrator disclosure standards, upon the request of customers (and, in industry cases, upon the request of associated persons with claims of statutory employment discrimination), for an additional six-month pilot period, until May 25, 2005.

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

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<sup>1</sup> 15 U.S.C. §78s(b)(1).

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

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

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 aspects of such statements.

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

1. Purpose

On November 21, 2002, the Commission approved, for a six-month pilot period, the Exchange’s proposal to amend PCX and PCXE arbitration rules to require industry parties in arbitration to waive application of contested California arbitrator disclosure standards, upon the request of customers or, in employment discrimination cases, upon the request of associated persons.<sup>5</sup> The Commission approved an extension of the pilot period on May 15, 2003,<sup>6</sup> November 19, 2003<sup>7</sup> and May 24, 2004.<sup>8</sup> The pilot period is currently set to expire on November 24, 2004.

On July 1, 2002, the Judicial Council of the State of California adopted new rules that mandated extensive disclosure requirements for arbitrators in California (the “California Standards”). The California Standards are intended to address perceived conflicts of interest in certain commercial arbitration proceedings. As a result of the imposition of the California Standards on arbitrations conducted under the auspices of self-regulatory organizations (“SROs”), the National Association of Securities Dealers, Inc. (“NASD”) and the New York Stock Exchange (“NYSE”) suspended the appointment of arbitrators for cases pending in California, and filed a

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

<sup>5</sup> See Exchange Act Release No. 46881 (November 21, 2002), 67 FR 71224 (November 29, 2002) (Order approving SR-PCX-2002-71).

<sup>6</sup> See Exchange Act Release No. 47872 (May 15, 2003), 68 FR 28869 (May 27, 2003) (Order approving SR-PCX-2003-22).

<sup>7</sup> See Exchange Act Release No. 48806 (November 19, 2003), 68 FR 66521 (November 26, 2003) (Order approving SR-PCX-2003-61).

joint complaint in federal court for declaratory relief in which they contend that the California Standards cannot lawfully be applied to NASD and NYSE because the California Standards are preempted by federal law and are inapplicable to SROs under state law.<sup>9</sup> Subsequently, in the interest of continuing to provide investors with an arbitral forum in California pending the resolution of the applicability of the California Standards, the NASD and NYSE filed separate rule proposals with the Commission that would temporarily require their members to waive the California Standards if all non-member parties to arbitration have done so. The Commission approved the NASD's rule proposal on September 26, 2002<sup>10</sup> and the NYSE's rule proposal on November 12, 2002.<sup>11</sup> Both the NASD and the NYSE filed rule proposals to further extend the pilot period for additional six-month periods.<sup>12</sup>

Since the NASD's and NYSE's lawsuit relating to the application of the California Standards has not been resolved, PCX is now requesting an extension of the pilot for an additional six months (or until the pending litigation has resolved the question of whether or not the California

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<sup>8</sup> See Exchange Act Release No. 49758 (May 24, 2004), 69 FR 30734 (May 28, 2004) (Order approving SR-PCX-2004-25).

<sup>9</sup> See Motion for Declaratory Judgment, NASD Dispute Resolution, Inc. and New York Stock Exchange, Inc., v. Judicial Council of California, filed in the United States District Court for the Northern District of California, No. C 02 3486 SBA (July 22, 2002), available on the NASD Web site at: [www.nasdaq.com/pdf-text/072202\\_ca\\_complaint.pdf](http://www.nasdaq.com/pdf-text/072202_ca_complaint.pdf).

<sup>10</sup> See Exchange Act Release No. 46562 (September 26, 2002), 67 FR 62085 (October 3, 2002) (Order approving SR-NASD-2002-126). Thereafter, the pilot period was extended to September 30, 2003. See Exchange Act Release No. 48187 (July 16, 2003), 68 FR 43553 (July 23, 2003) (Order approving SR-NASD-2003-106).

<sup>11</sup> See Exchange Act Release No. 46816 (November 12, 2002), 67 FR 69793 (November 19, 2002) (Order approving SR-NYSE-2002-56). Thereafter, the pilot period was extended to September 30, 2003. See Exchange Act Release No. 47836 (May 12, 2003), 68 FR 27608 (May 20, 2003) (Order approving SR-NYSE-2003-16).

Standards apply to SROs). PCX requests that the pilot be extended for six months beginning on November 25, 2004. The extension of time permits the Exchange to continue the arbitration process using PCX rules regarding arbitration disclosures and not the California Standards. No substantive changes are being made to the pilot program, other than extending the operation of pilot program.

## 2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b)<sup>13</sup> of the Act, in general, and furthers the objectives of Section 6(b)(5),<sup>14</sup> in particular, in that it is designed to promote just and equitable principles of trade by ensuring that members and member organizations and the public have a fair and impartial forum for the resolution of their disputes.

### 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

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<sup>12</sup> See Exchange Act Release No. 48553 (September 26, 2003), 68 FR 57494 (October 3, 2003) (Order approving SR-NASD-2003-144); Exchange Act Release No. 49452 (March 19, 2004) 69 FR 17010 (March 31, 2004) (Order approving SR-NASD-2004-40); Exchange Act Release No. 48552 (September 26, 2003), 68 FR 57496 (October 3, 2003) (Order approving SR-NYSE-2003-28); Exchange Act Release No. 49521 (April 2, 2004), 69 FR 18661 (April 8, 2004) (Order approving SR-NYSE-2004-18); Exchange Act Release No. 50447 (September 24, 2004), 69 FR 58567 (September 30, 2004) (Order approving SR-NASD-2004-126); and Exchange Act Release No. 50449 (September 24, 2004), 69 FR 58985 (October 1, 2004) (Order approving SR-NYSE-2004-50).

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(5).

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. Therefore, the foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>15</sup> and Rule 19b-4(f)(6) thereunder.<sup>16</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.

Pursuant to Rule 19b-4(f)(6)(iii) under the Act,<sup>17</sup> the proposal may 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, and the self-regulatory organization must file notice of intent to file the proposed rule change at least five business days beforehand. 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 that waiving the 30-day operative date is consistent with the protection of investors and the public interest.<sup>18</sup> Waiving the pre-filing requirement and accelerating the operative date will merely extend a pilot program that is designed to provide investors with a mechanism to resolve disputes with broker-dealers. During the period of this extension, the Commission and PCX will continue to monitor the status of the

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

<sup>16</sup> 17 CFR 240.19b-4(f)(6).

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

previously discussed litigation. For these reasons, the Commission designates that the proposed rule change has become effective and operative immediately.

#### 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
- Send an E-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-PCX-2004-104 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-2004-104. 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 Section, 450 Fifth Street, NW, Washington, DC

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For purposes 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).

20549. Copies of such filing also will be available for inspection and copying at the principal office of 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-2004-104 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>19</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>19</sup> 17 CFR 200.30-3(a)(12).