

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-51094; File No. SR-PCX-2004-43)

January 28, 2005

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the Pacific Exchange, Inc. and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 3 Thereto Relating to a Proposed Listing Fee Schedule for Structured Products

I. Introduction

On May 11, 2004, the Pacific Exchange, Inc. (“PCX”) submitted to the Securities and Exchange Commission (“Commission”), 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> a proposed rule change to amend its fee schedule to provide separate listing fees for structured products. PCX filed Amendment No. 1 to the proposed rule change on August 9, 2004.<sup>3</sup> PCX filed Amendment No. 2 to the proposed rule change on August 23, 2004.<sup>4</sup>

The proposed rule change and Amendment Nos. 1 and 2 were published for comment in the Federal Register on September 24, 2004.<sup>5</sup> The Commission received no comment letters on the proposed rule change and Amendment Nos. 1 and 2. PCX filed Amendment No. 3 to the proposed

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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> See letter from Tania Blanford, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation (“Division”), Commission, dated August 5, 2004 (“Amendment No. 1”). Amendment No. 1 replaced and superseded the original filing in its entirety. In Amendment No. 1, PCX added a definition of “Structured Products” to the proposal and made other clarifying changes.

<sup>4</sup> See letter from Tania Blanford, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division, Commission, dated August 20, 2004 (“Amendment No. 2”). In Amendment No. 2, PCX made a minor typographical correction to its proposed rule text.

<sup>5</sup> See Securities Exchange Act Release No. 50448 (October 1, 2004), 69 FR 58989.

rule change on December 9, 2004.<sup>6</sup> This order approves the proposed rule change and Amendment Nos. 1 and 2, and issues notice of filing of, and approves on an accelerated basis, Amendment No. 3.

## II. Description of the Proposed Rule Change

The PCX, through its wholly-owned subsidiary PCX Equities, Inc. (“PCXE”), has proposed to adopt new listing fees specifically for Structured Products listed and traded on the Archipelago Exchange. The proposed listing fees include a non-refundable listing application fee, initial listing fees, and annual maintenance fees for Structured Products. The proposal adds a definition of “Structured Products”<sup>7</sup> to the PCXE rules to clarify which products would be assessed the proposed listing fees.

In Amendment No. 3 to the proposed rule change, PCX added definitions of “Exchange-Traded Fund”<sup>8</sup> and “Closed-End Fund”<sup>9</sup> to the PCXE rules and a definition of “Funds”<sup>10</sup> to the

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<sup>6</sup> In Amendment No. 3, PCX added definitions for exchange-traded funds and closed-end funds and added a statement to the fee schedule to clarify that the term “Funds” refers to exchange-traded funds and closed-end funds in order to properly distinguish Funds from Structured Products.

<sup>7</sup> As modified by Amendment No. 3, Structured Products are defined as “products that are derived from and/or based on a single security or securities, a basket of stocks, an index, a commodity, debt issuance and/or a foreign currency, among other things” and would include “index and equity linked notes, term notes and units generally consisting of a contract to purchase equity and/or debt securities at a specified time.”

<sup>8</sup> Amendment No. 3 defines Exchange-Traded Funds as “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.”

<sup>9</sup> Amendment No. 3 defines Closed-End Funds (“CEFs”) as “a type of investment company registered under the Investment Company Act of 1940 that offers a fixed number of shares” that “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.”

<sup>10</sup> Amendment No. 3 provides that “Funds”, as that term is used in the Fee Schedule, include Exchange-Traded Funds and Closed-End Funds.

PCXE fee schedule. Amendment No. 3 also modified the proposed definition of “Structured Products.” Amendment No. 3 seeks to distinguish Structured Products from Funds and to further clarify the application of the different listing fees.

### III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 3, including whether Amendment No. 3 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-2004-43 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-2004-43. 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 also will be available for inspection and copying at the principal office of the Exchange. 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-2004-43 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

#### IV. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>11</sup> In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(4) of the Act,<sup>12</sup> which requires that a national securities exchange's rules provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

The Commission notes that the proposed rule change would enact a revised fee schedule to provide separate fees for the listing of structured products. The Commission also notes that the proposed fees would apply indiscriminately to all issuers of structured products. The Commission believes that the revised fee schedule should provide clarity to issuers regarding the appropriate fees applicable to structured products. Therefore the Commission believes that the proposed rule change, as amended, is consistent with the Act.

The Commission finds good cause for accelerating approval of Amendment No. 3 prior

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<sup>11</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>12</sup> 15 U.S.C. 78f(b)(4).

to the thirtieth day after publication in the Federal Register. The Commission notes that the proposed rule change and Amendment Nos. 1 and 2 thereto were noticed for the full comment period and that no comments have been received on the proposal. The Commission further notes that Amendment No. 3 merely clarifies the proposal by adding definitions to its rules to codify the application of the various fees for the different derivative products. The Commission believes that accelerated approval should permit PCX to begin promptly to assess the new listing fees for structured products. For this reason, the Commission finds good cause exists, consistent with Section 19(b)(2) of the Act,<sup>13</sup> to approve Amendment No. 3 on an accelerated basis.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>14</sup> that the proposed rule change (SR-PCX-2004-43), as amended by Amendment Nos. 1 and 2, is hereby approved, and that Amendment No. 3 is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>13</sup> 15 U.S.C. 78s(b)(2).

<sup>14</sup> Id.

<sup>15</sup> 17 CFR 200.30-3(a)(12).