

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-52225; File No. SR-PCX-2005-19)

August 8, 2005

Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to Proposed New Listing Fees

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 February 28, 2005, the Pacific Exchange, Inc. (“PCX”), through its wholly owned subsidiary PCX Equities, Inc. (“PCXE” 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 PCXE. On June 15, 2005, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> 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 Exchange is proposing to amend its Schedule of Fees and Charges (“Schedule”), as follows: (1) implement new initial listing fees specifically for common stock issued in initial public offerings (“IPOs”)<sup>4</sup> and listed exclusively by the PCXE for trading on the Archipelago Exchange (“ArcaEx”), a facility of the PCXE, and make related modifications to the initial

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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> In Amendment No. 1, the Exchange (a) modified the text of the proposed rule change to clarify the implementation of the proposed rule change and to add provisions regarding American Depositary Receipts and American Depositary Shares and (b) provided further information regarding the purpose of the proposal.

<sup>4</sup> An “IPO” is the first public sale, issuance or distribution of stock by a company. IPOs include “spin-offs” where a company’s common shares are issued or distributed to shareholders of the “parent” company subject to registration under the Act.

listing fees; (2) exempt from initial listing fees already-public issues which are listed and/or quoted on other marketplaces (“Transfer Listings”), whether or not dually listed; (3) exempt from annual maintenance fees transfer listings for the first 12 calendar months after listing, whether or not dually listed; (4) revise the annual maintenance fees; and (5) revise the additional shares listing fees.

The text of the proposed rule change is available on PCX’s Web site, <http://www.pacificex.com>, at PCX’s Office of the Secretary, and at the Commission’s Public Reference Section.

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

In its filing with the Commission, PCXE 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. PCXE 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to increase certain portions of its listing fees and make a number of related modifications. PCXE has determined that such increases are necessary to help ensure sufficient cost recovery resulting from expenditures for operations, technology and infrastructure incurred in connection with ArcaEx’s listings initiative.<sup>5</sup> ArcaEx has made and continues to

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<sup>5</sup> The Exchange represents that the proposed listings fees modifications, including the proposed exemptions from certain listing fees, will not negatively impact the Exchange’s regulatory program.

make substantial investments in resources, services and value-added products that are readily available for listed companies, including a recently launched data product that provides a wide variety of market-related information to issuers.<sup>6</sup> The Exchange also developed the proposed revised Schedule in order to compete effectively with other markets for new listings on the basis of cost and value. Considering the nature and breadth of the benefits and services available to listed issuers, the Exchange believes that the proposed revised Schedule offers listed issuers significant economic benefits. Moreover, notwithstanding these proposed increases and modifications to the Schedule, these fees are generally lower than comparable listing fees at other marketplaces.<sup>7</sup>

#### Summary of Current and Proposed Fees

##### (a) Initial Listing Fees

Currently, the one-time initial listing fee for common stock is based on whether the issue is dually listed on the New York Stock Exchange, the American Stock Exchange, or the Nasdaq National Market. If an issue is dually listed, the initial listing fee is fixed at \$10,000 per issue; otherwise, the initial listing fee is fixed at \$20,000 per issue. The initial listing fee for additional classes of common stock, preferred stock, warrants, debit instruments, purchase rights and units

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<sup>6</sup> The Exchange acknowledges that a number of the proposed changes represent significant increases from prior listing fees. However, PCXE believes that the initial listing and related fees are extremely dated as the Exchange has not modified them in a number of years. Further, following the 2002 alliance between PCX and Archipelago that established the Archipelago Exchange as a facility of the Exchange, the Exchange has committed extensive resources and efforts to develop and support the listings program. Since then, the Exchange continued to operate under an antiquated Schedule and now finds that some modifications, which include some increases to certain fees, are necessary to operate the listings program and effectively compete in the marketplace.

<sup>7</sup> See listing fees of the American Stock Exchange ([www.amex.com](http://www.amex.com)) and the Nasdaq National Market ([http://www.nasdaq.com/about/nasdaq\\_listing\\_req\\_fees.pdf](http://www.nasdaq.com/about/nasdaq_listing_req_fees.pdf)).

is \$2,500, regardless of whether such securities are also listed elsewhere. These fees apply to each issue listed, regardless of shares outstanding or listing tier classification.

PCXE proposes initial listing fees specifically for common stock listed in conjunction with IPOs. For IPOs listed exclusively on Tier I,<sup>8</sup> PCXE proposes initial listing fees based on the aggregate total shares outstanding, as follows:

<u>Aggregate Total Shares Outstanding</u> <sup>9</sup>	<u>Initial Listing Fee</u>
Less than 10,000,000	\$25,000
10,000,001 to 30,000,000	\$75,000
30,000,001 to 75,000,000	\$100,000
Greater than 75,000,000	\$125,000

The Exchange proposes an IPO Tier I initial listing fees based on a sliding scale of the issuer's aggregate total shares outstanding. With this tiered structure the Exchange intends to reflect the time and resources necessary to review listing applications that correspond generally to the size of issuers, the complexity of capital structures and financial statements, and the sophisticated nature of business plans and transactions.

For IPOs listed exclusively on Tier II,<sup>10</sup> the Exchange proposes a fixed initial listing fee of \$25,000. The Exchange believes this fixed fee is appropriate because Tier II listed issuers are typically smaller-capitalized issuers with relatively shorter operating histories than Tier I

<sup>8</sup> See PCXE Rule 5.2(c).

<sup>9</sup> The Exchange will determine the issuer's aggregate total shares outstanding as reported by the issuer in its periodic filings with the Commission or other publicly available information.

<sup>10</sup> See PCXE Rule 5.2(k).

qualified issuers. Further, a fixed fee for these issuers will enable the Exchange to compete for listings of this size with other marketplaces.

For IPOs that dually list, the Exchange proposes an exemption from initial listing fees. The Exchange also proposes an exemption from initial listing fees for Transfer Listings, whether exclusively or dually listed. These exemptions apply regardless of Tier classification or shares outstanding. The Exchange believes these exemptions are appropriate in order for the Exchange to effectively compete for dual listings.<sup>11</sup> The applicable fees to list additional classes of common stock, preferred stock, warrants, debit instruments, purchase rights and units will remain unchanged.

The Exchange proposes to implement these new IPO and Transfer Listing fees for all listing applications submitted on or after April 1, 2005, should the Commission approve the proposed rule change. The current fees will continue to apply to issues already listed or applications that are pending as of March 31, 2005.

(b) Annual Maintenance Fees

Currently, the annual maintenance fees are fixed and based on whether the issue is dually listed on the New York Stock Exchange, American Stock Exchange, or the Nasdaq National Market. For dually listed securities, the maintenance fee is \$1,000 per issue; otherwise, the maintenance fee is \$2,000 per issue. For each additional issue, the annual maintenance fee is \$500. The annual minimum fee is \$1,000 and the annual maximum fee is \$5,000. Moreover,

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<sup>11</sup> The Exchange expends similar time, energy and resources in processing issuers that dual list. However, the Exchange has made a business decision to forgo the initial listing fee for competitive purposes and anticipates that it will make up the cost in other listings related fees and future listing business.

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 Exchange proposes to adopt specific annual maintenance fees for exclusive IPO listings. For Tier I exclusive IPO listings, PCXE proposes to adopt annual maintenance fees based on the aggregate total shares outstanding, as follows:<sup>12</sup>

<u>Aggregate Total Shares Outstanding</u>	<u>Annual Maintenance Fee</u>
Less than 10,000,000	\$15,000
10,000,001 to 50,000,000	\$20,000
50,000,001 to 100,000,000	\$35,000
Greater than 100,000,000	\$50,000

For Tier II exclusive IPO listings, PCXE proposes to adopt an annual maintenance fee of \$12,500, regardless of shares outstanding. Consistent with current practice, the Exchange will not assess these annual maintenance fees for the year of listing, but rather, will first assess them for the first full calendar year following the year of listing.

For dual IPO and Transfer Listings, the Exchange proposes an exemption from annual maintenance fees for the first 12 calendar months following listing for competitive purposes.<sup>13</sup>

<sup>12</sup> Similar to the initial listing fees, the purpose of the tiered pricing based on aggregate total shares outstanding is to charge the listed company a maintenance fee depending on the time, energy and resources necessary, given the size of the listed issuer.

<sup>13</sup> In February 2004, Nasdaq determined that it would not charge entry, annual or additional listing fees for a one-year period from the date of listing on Nasdaq for any NYSE listed security that dually listed on Nasdaq between January 12, 2004 and December 31, 2004. See Securities Exchange Act Release No. 49286 (February 19, 2004), 69 FR 8999 (February 26, 2004) (SR-NASD-2004-004). Subsequently, Nasdaq exempted from entry and additional listing fees those NYSE issuers remaining dually listed after the one-year period and those NYSE issuers dually listing thereafter, but imposed an annual fee of \$15,000 on such issuers at the end of their first year on Nasdaq. See Securities Exchange

At the end of this 12-month period, the Exchange will assess, on a pro-rated basis, the applicable annual maintenance fee for the balance of the then current calendar year.<sup>14</sup> Thereafter, for exclusive Transfer Listings, the Exchange will assess an annual maintenance fee based on the fees set forth above for exclusive IPOs, depending on Tier classification. For dual listings (including dual IPO and Transfer Listings), the Exchange will assess a fixed annual maintenance fee of \$10,000, regardless of Tier classification or shares outstanding. The Exchange intends to make these assessments at the beginning of the calendar year for that year. If any such dual listing subsequently lists exclusively, the Exchange will assess an annual maintenance fee based on the fees set forth above for exclusive IPOs, starting in the first full calendar year following the change to an exclusive listing.

PCXE proposes to implement these revised annual maintenance fees for all listing applications submitted on or after April 1, 2005, should the Commission approve the proposed rule change. For all issues already listed, and listing applications pending, as of March 31, 2005, the current annual maintenance listing fees will continue to apply.

In addition, the Exchange proposes to increase the maximum annual maintenance fee payable by a single issuer for all issues listed from \$5,000 to \$90,000, in order to be consistent with the fee changes proposed herein. Annual maintenance fees will not be pro-rated or reduced for securities that delist for any reason.

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Act Release No. 51005 (January 10, 2005), 70 FR 2917 (January 18, 2005) (SR-NASD-2004-142).

<sup>14</sup> For example, an issuer that transfers a listing in June 2005 will be subject to the exemption and will not be assessed annual maintenance fees until June of 2006 (prorated for 2006) when the issuer would ordinarily be assessed annual maintenance fees in January 2006 for the first full calendar year after listing.

(c) Additional Shares Listing Fee

Currently, the fee applicable to issuers to list additional shares is \$.0025 per share listed, with a \$500 minimum and a \$7,500 maximum per application. The maximum total charge per year is \$15,000.

The Exchange proposes to make a number of modifications to the Additional Shares Listing Fee. For all exclusive listings, including exclusive IPO and transfer listings, the Exchange proposes to eliminate the per share fee entirely for the first 99,999 additional shares per application. The Exchange proposes to eliminate the fee on these shares so as not to assess issuers for small additional issuances and also to enhance its ability to effectively compete with other marketplaces.<sup>15</sup> For such listings, the \$.0025 per share fee will remain the same, and will be assessed beginning on each additional share listed above 99,999. The Exchange also proposes increased maximum charges for listed issuers that choose to list additional shares, that is, to increase the \$7,500 maximum charge per application to \$15,000 and the \$15,000 annual maximum charge to \$30,000. These increases may potentially result in increased additional share charges for issuers, depending on the nature and size of the additional issuance. The \$500 minimum charge (per application) will remain unchanged.

For all dual listings, the Exchange proposes to eliminate the fee entirely for the first 99,999 additional shares per application in order to effectively compete with other marketplaces. The Exchange also proposes to eliminate the fee on these shares so as not to assess issuers for small additional issuances. For such listings, the \$.0025 per share fee will be assessed beginning on each additional share listed above 99,999. The Exchange also proposes to modify the annual

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<sup>15</sup> Nasdaq does not charge issuers for the first 49,999 additional shares listed each quarter. See supra note 7.

maximum charge applicable to such listings to \$14,000 so as to provide for an increased limitation for listed issuers that choose to list additional shares, which will result in charges that are beyond the current maximum charges. The minimum and maximum charge per application will remain unchanged. The Exchange further proposes an exemption from such additional share fees for all dual IPO and dual transfer listings for the 12 calendar months after listing.

Thereafter, such listings will be subject to the additional shares listing fee as set forth above.

Lastly, for dually listed American Depositary Receipts (“ADRs”) and American Depositary Shares (“ADSs”) only, the Exchange proposes to decrease the maximum additional shares listing charge per year to \$10,000 and maintain the minimum charge per application at \$500 and the maximum per application charge at \$7,500. These fees shall only be assessed on the ADRs and ADSs that are listed. The Exchange’s proposed revisions to the additional shares listing fees, as applicable, will apply to all currently listed issuers starting April 1, 2005, should the Commission approve the proposed rule change.

#### Implementation

PCXE proposes to implement the revised initial and annual maintenance listings fees, as applicable, for all applications submitted on or after April 1, 2005, should the Commission approve the proposed rule change. For all issues listed, and listing applications pending, as of March 31, 2005, the current initial and annual maintenance listing fees will continue to apply. The Exchange’s proposed revisions to the additional shares listing fees will apply going forward to all currently listed issuers starting April 1, 2005, should the Commission approve the proposed rule change.

## 2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b)<sup>16</sup> of the Act, in general, and Section 6(b)(4)<sup>17</sup> of the Act, in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among issuers 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 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

The Exchange did not solicit or receive any written comments with respect to the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change 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 self-regulatory organization consents, the Commission will:

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

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<sup>16</sup> 15 U.S.C. 78f(b).

<sup>17</sup> 15 U.S.C. 78f(b)(4).

#### 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-2005-19 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-PCX-2005-19. 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. 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-2005-19 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>18</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).