

for comment in the **Federal Register** on May 9, 2003.³ No comments were received on the proposed rule change.

Current PCX Rule 6.82 requires the Options Allocations Committee ("OAC") to allocate option issues to LMMs based on an overall evaluation of such factors as a candidate's adequacy of capital, operational capacity, support personnel, trading crowd evaluations and history of adherence to Exchange rules and securities laws. However, absent extraordinary circumstances, no LMM may be allocated more than 15% of the number of issues traded on the options floor.

The Exchange now proposes to eliminate this fixed concentration limit. Instead, PCX would add the number and quality of issues already allocated to an LMM to the list of factors considered by the OAC. Additionally, PCX would adopt a guideline requiring the OAC to consider the concentration of an LMM's issues if an event or proposal would cause the LMM to meet either of the following criteria: (i) The number of issues allocated to it (and any affiliated LMM) is 25% or more of the total number of issues traded on the PCX; or (ii) the volume in the issues allocated to it (and any affiliated LMM) is 50% or more of the total volume of the PCX or 25% or more of the total volume in equity option issues of the PCX. If an LMM met either of these criteria, the guideline would require the OAC to evaluate whether the event or proposal would result in an unacceptable level of concentration. If so, the OAC could exercise its discretion and take action to lower the resulting level of concentration or to deny the subject proposal. The OAC would also retain the discretion to review an LMM's level of concentration at any time, regardless of whether the above criteria are met.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁴ Specifically, the Commission finds that the proposal is consistent with section 6(b)(5) of the Act,⁵ which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect

the mechanism of a free and open market, and to protect investors and the public interest.

The Commission has previously noted that PCX's concentration limits serve the purpose of minimizing the disturbance to a fair and orderly market that might otherwise result from the failure of an LMM.⁶ However, as the Commission has also noted, other exchanges do not impose specified mandatory limits on the number of options that may be allocated to specialists.⁷ The Commission believes that the approach proposed by PCX is similar to one employed by the Chicago Board Options Exchange ("CBOE"). Like the proposed PCX Rule and Guidelines, CBOE Rule 8.84 and Regulatory Guideline 99-135 do not impose a mandatory cap on the number of issues that may be allocated to a Designated Primary Market-Maker ("DPM"). Instead, the CBOE guideline provides that a review with the relevant committee may be triggered when, *inter alia*, the number of classes allocated to a DPM is 25% or more of the total number of classes traded on CBOE. The Commission believes that it is permissible for the PCX to adopt a similar approach. The Commission further believes that the proposed rule changes should provide PCX with an appropriate degree of regulatory flexibility, and allow it to compete more effectively with other exchanges. At the same time, the proposal should preserve the Exchange's ability to minimize the risks associated with potential LMM failures.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,⁸ that the proposed rule change (File No. SR-PCX-2002-25) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁹

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48028; File No. SR-PCX-2003-26]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Relating to Changes in Marketing Fees

June 13, 2003.

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 May 30, 2003, the Pacific Exchange, Inc. ("PCX") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which the PCX has prepared. 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 is proposing to change its marketing fee for certain options and to adopt new marketing fees for recently listed options. The text of the proposed change is available at the PCX and at the Commission.

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 had 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

Purpose

The PCX recently adopted a payment-for-order-flow program under which it charges a marketing fee ranging from \$0 to \$1.00 per contract on a per issue basis.³ The PCX segregates the funds from this fee by trading post and makes

³ See Securities Exchange Act Release No. 47795 (May 5, 2003), 68 FR 25074.

⁴ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78(c)(f).

⁵ 15 U.S.C. 78f(b)(5).

⁶ See Securities Exchange Act Release No. 42583 (March 28, 2000), 65 FR 17689 (April 4, 2000).

⁷ *Id.* at 17690; Chicago Board Options Exchange Rule 8.84, Regulatory Guideline 99-135; American Stock Exchange Rule 26, Interp. 03.

⁸ 15 U.S.C. 78s(b)(2).

⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Act Release No. 44830 (September 21, 2001), 66 FR 49728 (September 28, 2001) (PCX-2001-37).