

and advisory services based on the particular facts and circumstances in the arrangements. The Commission believes that it is within NASD's discretion to delete this exception and to continue to review such acquisitions based on the particular facts and circumstances.

#### *E. Lock-Up Restriction*

Under the proposal, common or preferred stock, options, warrants, and other equity securities of the issuer that are unregistered and acquired by an underwriter and related person within 180 days before the filing of the registration statement, or acquired after the filing of the registration statement and deemed to be compensation by NASD, would be subject to a 180-day lock-up. The proposed lock-up also would prohibit certain derivative transactions.<sup>25</sup> In addition, the proposal contains several exceptions to the lock-up restriction for transfers of securities, including, but not limited to, transfers of securities that are not considered to be an item of value, transfers by operation of law or reorganization of the issuer, and transfers of securities that were previously, but no longer are, subject to a lock-up restriction in connection with a prior public offering.

Under the original version of the proposal, a 180-day lock-up restriction would have applied to all equity securities of the issuer that are held by any underwriter and related person at the time of effectiveness of the public offering, unless the securities or transaction complied with an exception. In response to comments, NASD determined to limit the 180-day lock-up to unregistered equity or convertible-to-equity securities and certain derivatives held by underwriters and related persons and acquired during the Review Period. Despite contrary views of commenters, NASD determined to retain the lock-up provision in connection with secondary offerings. However, the proposal would provide an exception from the lock-up restrictions for Rule 144A securities acquired after the completion of the issuer's IPO. In addition, in response to comments, NASD is proposing to amend the proposed rule change to clarify that members may participate in public offerings in which the members, their affiliates or associated persons are offering their shares or are selling security-holders of another issuer.

<sup>25</sup> However, as discussed above, debt securities and derivative instruments (1) that are not items of value, or (2) that are eligible for the limited filing requirement in NASD Rule 2710(b)(6)(A)(iv) and have not been deemed to be underwriting compensation by the Department under the Rule will not be subject to the lock-up.

NASD has stated that it intended to permit such participation, but the prior version of the proposal was unclear.

The Commission believes that the proposed lock-up restrictions, and exceptions thereto, are reasonably designed to protect the aftermarket in a new security from the potential for fraud and manipulation that exists when a member is an underwriter, actively trades the securities, and is a selling security-holder. The Commission further believes that the proposed prohibition against any hedging, short sale, derivative, put, or call transaction that would result in the effective economic disposition of the securities should help to prevent circumvention of the lock-up restrictions.

#### *F. Exemptive Authority*

Under the proposal, the NASD has retained the ability to grant exemptions from any provision of the Rule, if such exemption is consistent with the purposes of the Rule, the protection of investors, and the public interest. The Commission believes that this exemptive authority is reasonable and should give NASD the authority to exempt transactions that, although covered by the Rule, the Rule was not intended to address.

The Commission finds good cause for accelerating approval of Amendment Nos. 6, 7, 8, 9, and 10. The Commission notes that the proposed rule change has been previously published twice for comment.<sup>26</sup> Amendment Nos. 6 through 10 respond to the concerns previously raised by commenters and make certain technical corrections to the proposed rule change. Accordingly, the Commission finds that good cause exists, consistent with Sections 15A(b)(6) of the Act,<sup>27</sup> and Section 19(b)(2) of the Act<sup>28</sup> to accelerate approval of Amendment Nos. 6 through 10 to the proposed rule change prior to the thirtieth day after publication in the *Federal Register*.

#### *V. Solicitation of Comments*

Interested persons are invited to submit written data, views and arguments concerning Amendment Nos. 6 through 10, including whether the amendments are consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW, Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail

<sup>26</sup> See *supra* notes 6 and 10.

<sup>27</sup> 15 U.S.C. 78o-3(b)(6).

<sup>28</sup> 15 U.S.C. 78s(b)(2).

address: [rulecomments@sec.gov](mailto:rulecomments@sec.gov). All comment letters should refer to File No. SR-NASD-00-04. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hard copy or by e-mail but not by both methods.

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. Copies of such filing will also be available for inspection and copying at the principal office of NASD. All submissions should refer to File No. SR-NASD-00-04 and should be submitted by January 21, 2004.

#### *VI. Conclusion*

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>29</sup> that the proposed rule change (SR-NASD-00-04), as amended, is approved, and Amendment Nos. 6 through 10 are approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>30</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-48976; File No. SR-PCX-2003-68]

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

December 23, 2003.

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 December 16, 2003, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission

<sup>29</sup> 15 U.S.C. 78s(b)(2).

<sup>30</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.