

450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-125. 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 NASD. 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-NASD-2004-125 and should be submitted on or before March 25, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>17</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51273; File No. SR-NYSE-2004-031]

### Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendments No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 by the New York Stock Exchange, Inc. Relating to Appointments to the NYSE's Board of Arbitration and Other Changes to the NYSE's Arbitration Program

February 28, 2004.

#### I. Introduction

On June 21, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "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 relating to amendments to NYSE Rules 633, 634, and 635 relating to the administration of the Exchange's arbitration program. On October 29, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The proposed rule change, as amended, was published for comment in the *Federal Register* on January 4, 2005.<sup>4</sup>

On January 18, 2005, the Exchange filed Amendment No. 2 to the proposed rule change, which proposed certain technical changes to the rule text.<sup>5</sup> The Commission received one comment letter in response to the proposed rule change.<sup>6</sup> For the reasons discussed below, the Commission is approving the proposed rule change as amended.

#### II. Description of the Proposed Rule Change

##### A. Description of the Proposal

The proposed rule change consists of amendments to NYSE Rules 633, 634, and 635 concerning appointments of members of the Board of Arbitration, appointments to panels of securities and

non-securities arbitrators, and the appointment of the Director of Arbitration of the Exchange. NYSE Rule 633 governs the appointment of a Board of Arbitration, whose membership consists of current or former members of the Exchange, allied members, or officers of member corporations. Members of the Board of Arbitration decide controversies between parties who are members of the Exchange, allied members, member firms or member corporations. Currently, the Chairman of the NYSE Board appoints the members of the Board of Arbitration annually. As proposed, the Chairman will no longer appoint the members of the Board of Arbitration. Rather, the Director of Arbitration will do so, and she or he will do so on an ongoing basis rather than annually. Moreover, under the proposal, members of the Board of Arbitration may not be members of the Board of Executives.<sup>7</sup> Currently, under NYSE Rule 633, they may not be members of the Board of Directors.<sup>8</sup>

NYSE Rule 634 provides for the appointment of securities and non-securities arbitrators to standing panels of arbitrators available to decide customer disputes. Arbitration panels for individual disputes are typically composed of two non-securities arbitrators and one securities arbitrator.<sup>9</sup> Under the proposal, these arbitrators would be appointed by the Director of Arbitration rather than the Chairman of the NYSE Board, as is currently the case.<sup>10</sup> The proposal also would remove a provision stating that the NYSE will keep separate arbitration panels to serve within or outside of the New York metropolitan area because the provision

<sup>7</sup> The NYSE Board of Executives, which includes the Chairman of the NYSE Board and investors and representatives from member organizations, advises the Chief Executive Officer of the Exchange in his or her management of the operations of the Exchange. See NYSE Constitution, Article V, Section 1.

<sup>8</sup> Amendment No. 2, submitted on January 18, 2005, proposes a technical correction to the text of NYSE Rule 633, as follows. A proposed deletion appears in [brackets].

The Director of Arbitration shall appoint a Board of Arbitration to be composed of [such number of] present or former members, allied members and officers of member corporations of the Exchange who are not members of the Board of Executives.

<sup>9</sup> A securities arbitrator is someone "engaged in or retired from the securities business" and a non-securities arbitrator is someone "not engaged in the securities business." See NYSE Rule 634.

<sup>10</sup> As permitted by the NYSE Constitution, this authority has been delegated to the Vice President, Arbitration and Hearing Board. NYSE stated in its proposal that, in practice, arbitration department management routinely appoints new individuals to the rosters of arbitrators subject to the oversight of the Vice President.

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

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

<sup>3</sup> Letter from Karen Kupersmith, Director of Arbitration, NYSE, to Catherine McGuire, Chief Counsel, Division of Market Regulation, SEC, dated October 29, 2004.

<sup>4</sup> Exchange Act Release No. 50939 (Dec. 28, 2004), 70 FR 00420 (Jan. 4, 2005).

<sup>5</sup> Amendment 2, submitted electronically to the Commission on January 18, 2005 and signed by Mary Yeager, Assistant Corporate Secretary.

<sup>6</sup> Letter to Jonathan G. Katz, Secretary, Commission, from Robert S. Clemente, Esq., dated January 24, 2005, available online at <http://www.sec.gov/rules/sro/nyse/nyse200431/rscllemente4506.htm>.

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

does not reflect current Exchange practice.<sup>11</sup>

Currently, NYSE Rule 635 provides that the Chairman of the NYSE Board appoints the Director of Arbitration. In light of a recent corporate restructuring at the Exchange,<sup>12</sup> the proposal instead provides that the Chief Regulatory Officer will designate the Director of Arbitration, subject to the approval of the NYSE's Regulatory Oversight Committee.<sup>13</sup>

#### B. Comment Summary

The proposed rule change was published for comment in the **Federal Register** on January 4, 2005, and the Commission received one comment letter in response.<sup>14</sup> The commenter opposed the proposal. With regard to the Exchange's proposed changes to Rules 633 and 634, the commenter contended that the NYSE should separate itself and its management from the process of appointing arbitrators by implementing a system of review and oversight of the arbitrator appointment process. The commenter opposed delegating the arbitrator selection process to the Director of Arbitration.

With regard to Rule 635, the commenter stated that the rule should be amended to specify that the appointment of the Director of Arbitration by the Chief Regulatory Officer must be subject to the review and approval of the Regulatory Oversight Committee.

#### III. Discussion and Findings

After careful consideration of the proposal and the comment that was received, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>15</sup> Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act in that it promotes just and

equitable principles of trade by helping to ensure that members and member organizations and the public have a fair and impartial forum for the resolution of their disputes.<sup>16</sup>

The NYSE is updating its arbitration selection process to reflect more accurately the way in which arbitrators are selected. Specifically, as amended, NYSE Rule 633 would rest the obligation of selecting members of the Board of Arbitration with the Director of Arbitration, who is the NYSE staff person responsible for recruiting potential arbitrators. Similarly, NYSE Rule 634, as amended, would authorize the Director of Arbitration to appoint arbitration panel members. The Director of Arbitration reports to the Chief Regulatory Officer, who in turn reports to the Regulatory Oversight Committee and NSYE Board.

In response to the comment received, the Commission believes that the proposed rule change provides appropriate oversight over the appointment of arbitrators.<sup>17</sup> Important functions of the Exchange are routinely delegated to the Exchange staff. Nevertheless, the Board of Directors maintains the ultimate authority, and the responsibility, to ensure that the actions of the Exchange staff are carried out in a manner that is consistent with the federal securities laws.<sup>18</sup> Similarly, although the proposed text of Rule 635 does not expressly require that the Regulatory Oversight Committee review the Chief Regulatory Officer's appointment of a Director of Arbitration, as the commenter recommended, this appointment is subject to the oversight of the Regulatory Oversight Committee as a function of the Exchange's routine corporate governance structure.<sup>19</sup> Therefore, we believe the proposal sufficiently addresses the commenter's concerns.

The Commission finds good cause for approving Amendment No. 2 before the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The proposed Amendment No. 2 makes necessary technical corrections to the rule text and does not alter the substantive content of the rules.

<sup>16</sup> 15 U.S.C. 78f(b)(5).

<sup>17</sup> See, e.g., NYSE Constitution, Article IV, Section 14(a) ("Delegation Authority"); *id.*, Article VI, Section 4(a) (responsibilities of the Chief Regulatory Officer are "[s]ubject to the authority of the Board and the Regulatory Oversight & Regulatory Budget Committee").

<sup>18</sup> Increased scrutiny of applicants for the position of arbitrator, while a laudable goal, is beyond the scope of this particular proposed rule change.

<sup>19</sup> See Exchange Act Release No. 50939, *supra* note 4, 70 FR at 00421, citing NYSE Constitution, Article IV, Section 12(a)(4).

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether Amendment No. 2 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-NYSE-2004-031 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-NYSE-2004-031. 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 its 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 Amendment No. 2 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 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. 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-NYSE-2004-031 and should be submitted on or before March 25, 2005.

#### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>20</sup> that the proposed rule change (SR-NYSE-2004-031), as amended, be, and hereby is, approved, and that Amendment No. 2 thereto to the proposed rule change be,

<sup>20</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> Amendment No. 2 also proposes a technical correction to the text of NYSE Rule 634, as follows. The proposed deletion appears in [brackets]:

The Director of Arbitration shall from time to time appoint two panels of arbitrators, [.] the first of such panels shall be composed of persons engaged in or retired from the securities business and the second of such panels shall be composed of persons not engaged in the securities business.

<sup>12</sup> See Exchange Act Release No. 48946 (Dec. 17, 2003), 68 FR 74678 (Dec. 24, 2003).

<sup>13</sup> See NYSE Constitution, Article IV, Section 12(a)(4) (the Regulatory Oversight Committee is responsible for, *inter alia*, "personnel actions involving senior regulatory personnel").

<sup>14</sup> See *supra* note 6.

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

and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>21</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5-900 Filed 3-3-05; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51245; File No. SR-PCX-2004-117]

### Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. To Trade the streetTRACKS® Gold Shares Pursuant to Unlisted Trading Privileges

February 23, 2005.

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 10, 2004, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. The proposal would permit the Exchange to trade the streetTRACKS® Gold Shares ("GLD" or "Shares") pursuant to unlisted trading privileges ("UTP"). The Shares represent units of fractional undivided beneficial interests in and ownership of the streetTRACKS® Gold Trust ("Trust"). The Commission previously has approved GLD for original listing and trading on the New York Stock Exchange ("NYSE").<sup>3</sup>

On January 28, 2005, PCX filed Amendment No. 1 to the proposal.<sup>4</sup> The

Commission is publishing this notice and order to solicit comments on the proposed rule change, as amended, from interested persons and to approve the proposed rule change on an accelerated basis.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

PCX, through its wholly owned subsidiary PCX Equities, Inc. ("PCXE"), proposes to amend its rules governing the Archipelago Exchange ("ArcaEx"), the equities trading facility of PCXE, by adopting PCXE Rule 5.2(j)(5). The proposal would permit the Exchange to trade GLD on a UTP basis. The text of the proposed rule change is available on the Exchange's Web site (<http://www.pacificex.com>), at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### 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 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 III 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

The Exchange proposes to trade the streetTRACKS® Gold Shares (ticker symbol: GLD) pursuant to UTP. The value of each Share will correspond to a fixed amount of gold<sup>5</sup> and fluctuate with the spot price of gold. Purchasing Shares in the Trust provides investors a mechanism to participate in the gold market.

a. *Description of the Gold Market.* The global trade in gold consists of over-the-counter ("OTC") transactions in spot, forwards, and options and other derivatives, together with exchange-traded futures and options. The global

manipulation; and (9) state the restrictions of PCXE Rule 8.201(g)-(i) on ETP Holders acting as GLD market makers would apply.

<sup>5</sup> Initially, each Share will correspond to one-tenth of a troy ounce of gold. The amount of gold associated with each Share is expected to decrease over time as the Trust incurs and pays maintenance fees and other expenses.

gold market consists of the following components, described briefly below.

(1) *The OTC Market.* The OTC market trades on a continuous basis 24 hours per day and accounts for most global gold trading. Liquidity in the OTC market can vary from time to time during the course of the 24-hour trading day. Fluctuations in liquidity are reflected in adjustments to dealing spreads—the differential between a dealer's "buy" and "sell" prices. According to the Trust's Registration Statement, the period of greatest liquidity in the gold market is typically when trading in the European time zones overlaps with trading in the United States, which is when OTC market trading in London, New York, and other centers coincides with futures and options trading on the Commodity Exchange Inc. ("COMEX"), a division of the New York Mercantile Exchange, Inc. ("NYMEX"). This period lasts for approximately four hours each New York business day morning.

The OTC market has no formal structure and no open-outcry meeting place. The main centers of the OTC market are London, New York, and Zurich. Bullion dealers have offices around the world, and most of the world's major bullion dealers are either members or associate members of the London Bullion Market Association ("LBMA"), a trade association of participants in the London Bullion market.

There are no authoritative published figures for overall worldwide volume in gold trading. There are certain published sources that do suggest the significant size of the overall market. The LBMA publishes statistics compiled from the five members offering clearing services.<sup>6</sup> The monthly average daily volume figures published by the LBMA for 2003 range from a high of 19 million to a low of 13.6 million troy ounces per day.<sup>7</sup> COMEX publishes price and volume statistics for transactions in contracts for the future delivery of gold. COMEX figures for 2003 indicate that the average daily volume for gold

<sup>6</sup> Information regarding clearing volume estimates by the LBMA can be found at [http://www.lbma.org.uk/clearing\\_table.htm](http://www.lbma.org.uk/clearing_table.htm). The three measures published by LBMA are: volume, the amount of metal transferred on average each day measured in million of troy ounces; value, measured in U.S. dollars, using the monthly average London p.m. fixing price; and the number of transfers, which is the average number recorded each day. The statistics exclude allocated and unallocated balance transfers where the sole purpose is for overnight credit and physical movements arranged by clearing members in locations other than London.

<sup>7</sup> See NYSE Approval Order, 69 FR at 64614.

<sup>21</sup> 17 CFR 200.20-3(a)(12).

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

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

<sup>3</sup> See Securities Exchange Act Release No. 50603 (October 28, 2004), 69 FR 64614 (November 5, 2004) ("NYSE Approval Order").

<sup>4</sup> In Amendment No. 1, PCX replaced the filing in its entirety to, among other things: (1) Amend the proposed rule text to reference PCXE Rule 8.201(g)-(i); (2) clarify that the Shares would trade until 4:15 p.m. New York time; (3) clarify that last sale prices for the Shares are disseminated on a real-time basis; (4) represent that it would provide a link on its Web site to the NYSE Web site and the Trust Web site; (5) state that it would cease trading of the Shares if they were delisted from NYSE and not relisted on another exchange; (6) clarify that PCXE Rule 8.201(b) would be applicable to the Shares; (7) state that the Shares would be subject to trade-through provisions; (8) represent that its surveillance procedures would be adequate to deter