

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52237; File No. SR-ISE-2005-28]

### Self-Regulatory Organizations; International Securities Exchange, Inc.; Order Granting Approval of a Proposed Rule Change and Amendment No. 1 Thereto Relating to Fee Changes for Transactions in Options on the Standard & Poor's Depository Receipts® on a Retroactive Basis

August 10, 2005.

On May 20, 2005, the International Securities Exchange, Inc. ("ISE" or "Exchange") filed with 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 retroactively establish, as of January 10, 2005, a \$.10 per contract surcharge fee for certain transactions in options based on the Standard & Poor's Depository Receipts®, or SPDRs® ("SPDRs").<sup>3</sup> On June 15, 2005, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> The proposed rule change and Amendment No. 1 were published for comment in the **Federal Register** on July 11, 2005.<sup>5</sup> No comments were received regarding the proposal, as amended. This order approves the proposed rule change, as amended.

The Exchange's Schedule of Fees currently has in place a surcharge fee item that calls for a \$.10 per contract fee for transactions in certain licensed products. The Exchange has entered into a license agreement with Standard and Poor's, a unit of McGraw-Hill Companies, Inc., authorizing the Exchange to list SPDR options. The Exchange proposes to adopt this fee for transactions in SPDR options in order to defray the licensing costs. The Exchange believes that charging the participants that trade these instruments is the most equitable means of recovering the costs

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

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

<sup>3</sup> The Exchange filed with the Commission an identical fee change on May 20, 2005 (SR-ISE-2005-06), which was immediately effective as of that date under Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(2) thereunder. See Securities Exchange Act Release No. 51901 (June 22, 2005), 70 FR 37455 (June 29, 2005). Because the Exchange sought to apply the same surcharge fee on a retroactive basis as of January 10, 2005, the Exchange submitted this proposal to the Commission under Section 19(b)(2) of the Act.

<sup>4</sup> In Amendment No. 1, the Exchange made non-substantive changes to clarify the purpose for the fee change.

<sup>5</sup> See Securities Exchange Act Release No. 51948 (June 30, 2005), 70 FR 39832.

of the license. However, because competitive pressures in the industry have resulted in the waiver of transaction fees for Public Customers,<sup>6</sup> the Exchange proposes to exclude Public Customer Orders<sup>7</sup> from this surcharge fee. Accordingly, this surcharge fee will only be charged to Exchange members with respect to non-Public Customer Orders (e.g., Market Maker and Firm Proprietary orders) and shall apply to Linkage Orders under a pilot program that is set to expire on July 31, 2006.<sup>8</sup>

Additionally, the Commission notes that the Exchange has represented that, if it is concluded by the courts after all avenues of appeal that no license from Standard and Poor's was required by the Exchange to list SPDR options, then upon any refund by Standard and Poor's to the ISE, the Exchange shall submit a rule filing to the Commission providing for a reimbursement of the fees paid by members to the Exchange as a result of this surcharge.

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<sup>9</sup> and, in particular, the requirements of Section 6(b) of the Act<sup>10</sup> and the rules and regulations thereunder. Specifically, the Commission finds that the proposal to retroactively establish a \$.10 per contract surcharge fee for certain transactions in options on SPDRs that occurred on the ISE between January 10, 2005 and May 19, 2005,<sup>11</sup> is consistent with Section 6(b)(4) of the Act,<sup>12</sup> which requires the equitable allocation of reasonable dues, fees, and other charges among Exchange members and other persons using Exchange facilities. The Commission believes that, because the options on SPDRs have been listed and traded on the Exchange since January 10, 2005, the retroactive extension of the

<sup>6</sup> Public Customer is defined in ISE Rule 100(a)(32) as a person that is not a broker or dealer in securities.

<sup>7</sup> Public Customer Order is defined in ISE Rule 100(a)(33) as an order for the account of a Public Customer.

<sup>8</sup> See ISE Rule 1900(10) (defining Linkage Orders). The surcharge fee will apply to the following Linkage Orders: Principal Acting as Agent Orders and Principal Orders. The expiration date for this pilot program was recently extended from July 31, 2005 to July 31, 2006. See Exchange Act Release No. 34-52168 (July 29, 2005) (File No. SR-ISE-2005-32).

<sup>9</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> See *supra* note 3.

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

surcharge fee to all applicable transactions occurring between January 10, 2005 and May 19, 2005 is equitable in order to defray ISE's licensing costs.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>13</sup> that the proposed rule change (File No. SR-ISE-2005-28), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

Margaret H. McFarland,  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52238; File No. SR-PCX-2005-89]

### Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Market Maker Fee

August 10, 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 July 29, 2005, the Pacific Exchange, Inc. ("PCX" 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 the PCX. The PCX has designated this proposal as one establishing or changing a due, fee, or other charge imposed by a self-regulatory organization pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. 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 proposes to amend the Market Maker Fee in its Schedule of Fees and Charges. The text of the proposed rule change is available on the Exchange's Internet Web site (<http://www.pacificex.com>), at the Exchange's

<sup>13</sup> *Id.*

<sup>14</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.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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

Office of the Secretary, 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 PCX 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. 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

#### 1. Purpose

The PCX proposes to amend the Market Maker Fee. Currently, the fee is \$1,750 per month, and the fee is prorated for each day the Market Maker trades at the PCX. The PCX proposes to reduce the Market Maker Fee to \$1,500 per month and no longer prorate the fee based on daily usage. By no longer prorating the fee, the PCX would save a substantial amount of administrative time that is associated with tracking the daily access of each Market Maker. It also would allow the PCX to automate the billing of this fee. According to the PCX, based upon past history of overall usage by the PCX Market Makers, the reduction of the fee by \$250 per month, coupled with the elimination of the current policy to prorate the fee, would have little, if any, positive or negative impact on revenue for the Exchange.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>5</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act,<sup>6</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members.

### 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 purpose of the Act.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>7</sup> and paragraph (f)(2) of Rule 19b-4 thereunder,<sup>8</sup> because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## 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-2005-89 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-2005-89. 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. 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-2005-89 and should be submitted on or before September 7, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52241; File No. SR-PCX-2005-31]

### Self-Regulatory Organizations; Pacific Exchange, Inc.; Order Approving a Proposed Rule Change and Amendments No. 1, 2, and 3 Thereto To Permit Lead Market Makers To Operate Remotely

August 11, 2005.

#### I. Introduction

On March 15, 2005, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with 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 rules to allow Lead Market Makers ("LMMs") to operate from a remote location. The Exchange submitted Amendments No. 1, 2, and 3 on May 27, 2005,<sup>3</sup> June 6, 2005,<sup>4</sup> and

<sup>9</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.

<sup>3</sup> Amendment No. 1 makes clarifying changes to the purpose statement and rule text. Amendment No. 1 replaces the original rule filing in its entirety.

<sup>4</sup> Amendment No. 2 makes a technical correction to the rule text in Exhibit 5.

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

<sup>6</sup> 15 U.S.C. 78f(b)(4).

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>8</sup> 17 CFR 240.19b-4(f)(2).