

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-2005-91 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-NYSE-2005-91. 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 the 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-2005-91 and should be submitted on or before February 3, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

**Nancy M. Morris,**  
Secretary.

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**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53053; File No. SR-OCC-2003-13]

### Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving Proposed Rule Change To Establish a Comprehensive Standard of Care and Limitation of Liability With Respect to Clearing Members

January 5, 2006.

#### I. Introduction

On November 5, 2003, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") and on August 18, 2004, amended<sup>1</sup> proposed rule change SR-OCC-2003-13 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").<sup>2</sup> Notice of the proposal was published in the **Federal Register** on November 23, 2005.<sup>3</sup> No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

#### II. Description

In its 1980 release setting forth standards for registration of clearing agencies, the Commission's Division of Market Regulation stated that it was "of the view that clearing agencies should undertake to perform their obligations with a high degree of care."<sup>4</sup> In its 1983 order registering nine clearing agencies, the Commission stated that it did "not believe sufficient justification exists at this time to require a unique federal standard of care for registered clearing agencies."<sup>5</sup> The Commission has left to user-governed clearing agencies the question of how to allocate losses associated with, among other things, clearing agency functions. Along this line, in its 1986 order approving a proposed rule change of the Midwest Securities Trust Company ("MSTC") to clarify the rights and liabilities of MSTC and its participants with respect to certain services, the Commission stated:

The Act does not specify the standard of care that must be exercised by registered clearing agencies and the Commission has determined that imposition of a unique federal standard of care for registered

clearing agencies is not appropriate at this time. [citing Securities Exchange Act Release No. 20221, *supra* note 6] For those reasons the Commission believes that the clearing agency standard of care and the allocation of rights and responsibilities between a clearing agency and its participants applicable to clearing agency services generally may be set by the clearing agency and its participants. The Commission believes it should review clearing agency proposed rule changes in this area on a case-by-case basis and balance the need for a high degree of clearing agency care with the effect resulting liabilities may have on clearing agency operations, costs, and safeguarding of securities and funds.<sup>6</sup>

Because standards of care represent an allocation of rights and liabilities between a clearing agency and its users, which are generally sophisticated financial entities, the Commission has continued to refrain from establishing a unique federal standard of care and has allowed clearing agencies and other self-regulatory organizations and their users to establish their own standards of care.<sup>7</sup>

With this rule change, OCC is establishing a comprehensive gross negligence standard of care and limitation of liability with respect to its clearing members. In connection with this filing, OCC has made the following representations. OCC states in its original filing that since its founding in 1973, it has performed its clearing services with an exemplary level of care. Its record of fulfilling its commitments to its clearing members for over 30 years reflects OCC's commitment to serving the best interests of its clearing members. It has comprehensive systems and operating procedures in place to ensure that its clearing functions are executed with the highest level of accuracy. In addition to its own concern for accuracy, it is subject to extensive regulatory oversight by the Commission. Furthermore, in its amendment to the filing, OCC states that (1) gross negligence is the standard of care generally used by other clearing agencies such as the Fixed Income Clearing Corporation, (2) the decision to apply a gross negligence standard of care to OCC is a conscious allocation of risk between OCC and its members, (3) the filing was unanimously approved by OCC's directors, a majority of whom are officers of clearing members, and (4) the

<sup>1</sup> Letter from William H. Navin, Executive Vice President, General Counsel, and Secretary, OCC (August 17, 2005).

<sup>2</sup> 15 U.S.C. 78s(b)(1).

<sup>3</sup> Securities Exchange Act Release No. 52783 (November 16, 2005), 70 FR 70910.

<sup>4</sup> Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 45167 (June 23, 1980).

<sup>5</sup> Securities Exchange Act Release No. 20221 (September 23, 1983), 48 FR 45167 (October 3, 1983).

<sup>6</sup> Securities Exchange Act Release No. 22940 (February 24, 1986), 51 FR 7169 (February 28, 1986).

<sup>7</sup> See, e.g., Securities Exchange Act Release Nos. 51669 (May 9, 2005), 70 FR 25634 (May 13, 2005) [File No. SR-NSSC-2004-09]; 48201 (July 21, 2003), 68 FR 44128 (July 25, 2003) [File No. SR-GSCC-2002-10]; 37563 (August 14, 1996), 61 FR 43285 (August 21, 1996) [SR-PSE-96-21]; and 37421 (July 11, 1996), 61 FR 37513 (July 18, 1996) [SR-CBOE-96-02].

proposed rule change in no way will affect the very high level of care to which OCC has always held itself and to which it is held through the regulatory oversight of the Commission.<sup>8</sup> As such, OCC believes that a gross negligence standard of care is appropriate for OCC.<sup>9</sup>

### III. Discussion

Section 19(b) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in its custody or control.<sup>10</sup> The Commission believes that OCC's rule change is consistent with this Section because it will permit the resources of OCC to be appropriately utilized to protect funds and assets.<sup>11</sup>

### IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in

<sup>8</sup> Letter from William H. Navin, *supra*, n. 1.

<sup>9</sup> Specifically, OCC is amending Article VI of its By-Laws, "Clearance of Exchange Transactions," by adding new Section 25, "Limitation of Liability," which states:

(a) Notwithstanding any other provision in the By-Laws and Rules, the Corporation will not be liable for any action taken, or any delay or failure to take any action, under the By-Laws and Rules or otherwise, to fulfill the Corporation's obligations to its Clearing Members, other than for losses caused directly by the Corporation's gross negligence, willful misconduct, or violation of federal securities laws for which there is a private right of action. Under no circumstances will the Corporation be liable for the acts, delays, omissions, bankruptcy, or insolvency of any third party, including, without limitation, any bank or other depository, custodian, sub-custodian, clearing or settlement system, data communication service, or other third party, unless the Corporation was grossly negligent, engaged in willful misconduct, or was in violation of federal securities laws for which there is a private right of action, in selecting such third party; and

(b) Under no circumstances will the Corporation be liable for any indirect, consequential, incidental, special, punitive or exemplary loss or damage (including, but not limited to, loss of business, loss of profits, trading losses, loss of opportunity and loss of use) however suffered or incurred, regardless of whether the Corporation has been advised of the possibility of such damages or whether such damages otherwise could have been foreseen or prevented.

<sup>10</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>11</sup> The Commission notes that OCC's adoption of a comprehensive gross negligence standard of care and limitation of liability with respect to its clearing members does not affect the regulatory standards (e.g., those set forth in Section 17A of the Act) that apply to OCC or the way in which OCC conducts its clearing agency operations.

particular Section 17A of the Act and the rules and regulations thereunder.<sup>12</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-OCC-2003-13) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Nancy M. Morris,**

*Secretary.*

[FR Doc. E6-252 Filed 1-12-06; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53069; File No. SR-PCX-2006-01]

### Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Minimum Price Variation for Entry of Orders for Equity Securities Traded on the Archipelago Exchange

January 6, 2006.

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 January 4, 2006, the Pacific Exchange, Inc. ("PCX" or "Exchange"), through its wholly owned subsidiary, PCX Equities, Inc. ("PCXE"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The PCX filed the proposal pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) 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 the Substance of the Proposed Rule Change

The Exchange proposes to amend its rules governing the Archipelago

<sup>12</sup> The Commission notes that the rule change does not alleviate OCC from liability for violation of the Federal securities laws where there exists a private right of action and therefore is not designed to adversely affect OCC's compliance with the Federal securities laws and private rights of action that exist for violations of the Federal securities laws.

<sup>13</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).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

Exchange ("ArcaEx"), the equities trading facility of PCXE, to: (1) Amend Commentary .04 to PCXE Rule 7.6 on minimum price variations for quoting and entry of orders in equity securities; (2) delete Commentary .05 to PCXE Rule 7.6; (3) renumber Commentary .06 to PCXE Rule 7.6 and correct a cross-reference in that Commentary; and (4) delete Commentary .01 to PCXE Rule 6.16. The text of the proposed rule change is available on the PCX's Web site (<http://www.pacificex.com>), at the principal office of the PCX, 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 IV 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 Commission adopted Regulation NMS on April 6, 2005.<sup>5</sup> One of the new rules under Regulation NMS is Rule 612, Minimum Pricing Increment. That rule prohibits a national securities exchange, its members, and quotation vendors (among others) from displaying, ranking, or accepting a bid, offer, order, or indication of interest for any NMS stock that is priced in an increment smaller than \$0.01 per share, unless it is priced less than \$1.00 per share.<sup>6</sup> In the latter case, the exchange, its members, and its quotation vendors may display, rank, or accept a bid, offer, order, or indication of interest in the NMS stock in an increment no smaller than \$0.0001 per share.<sup>7</sup> The compliance date for Rule 612 is January 31, 2006.<sup>8</sup>

Currently, PCXE Rule 7.6, Commentary .04 provides that the minimum price variation ("MPV") for

<sup>5</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005). Regulation NMS is comprised of the rules at 17 CFR 642.600-642.612.

<sup>6</sup> See 17 CFR 242.612(a).

<sup>7</sup> See 17 CFR 242.612(b).

<sup>8</sup> See Securities Exchange Act Release No. 52196 (Aug. 2, 2005), 70 FR 45529 (Aug. 8, 2005).