SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50510; File No. SR–NYSE–2004–29]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the New York Stock Exchange, Inc., Relating to Amendments to Procedures for the Appointment of Arbitrators to Arbitration Cases

October 8, 2004.

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 June 10, 2004, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed amendments to its arbitration rules as described in Items I, II and III below, which items have been prepared by NYSE.[3] On October 6, 2004, NYSE submitted Amendment Nos. 1 and 2 to the proposed rule change.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended by Amendment Nos. 1 and 2, from interested persons.

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

The proposed rule change consists of amendments to NYSE Rule 607 concerning the procedures for the appointment of arbitrators to arbitration cases administered by NYSE. The proposed rule change would modify and make permanent an alternative method for the appointment of arbitrators currently offered under a pilot program.[5] The text of the proposed rule change, as amended by Amendment Nos. 1 and 2, is set forth below. Additions are in italics; deletions are in brackets.

* * * * *

Rule 607

[Designation of Number of Arbitrators]

Appointment of Arbitrators

(a) (1) In all arbitration matters involving customers and non-members where the matter in controversy exceeds $25,000, or where the matter in controversy does not involve or disclose a money claim, the Director of Arbitration shall appoint an arbitration panel which shall consist of no less than three (3) arbitrators, at least a majority of whom shall not be from the securities industry, unless the customer or non-member requests a panel consisting of at least a majority from the securities industry.

(2) An arbitrator will be deemed as being from the securities industry if he or she:

(i) Is a person associated with a member, broker/dealer, government securities broker, government securities dealer, municipal securities dealer or registered investment adviser, or

(ii) Has been associated with any of the above within the past five (5) years, or

(iii) Is retired from or spent a substantial part of his or her business career in any of the above, or

(iv) Is an attorney, accountant or other professional who devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two (2) years [.] *, or*

(v) Is an individual who is registered under the Commodity Exchange Act or is a member of a registered futures association or any commodity exchange or is associated with any such person(s).

(3) An arbitrator who is not from the securities industry shall be deemed a public arbitrator. A person will not be classified as a public arbitrator if he or she has a spouse or other member of the household who is a person associated with a registered broker, dealer, municipal securities dealer, government securities broker, government securities dealer or investment adviser.

(b) Composition of Panels

The individuals who shall serve on a particular arbitration panel shall be determined by the Director of Arbitration. The Director of Arbitration may name the chairman of each panel.

[Voluntary Supplemental Procedures for Selecting Arbitrators]

[(a)] *(c)* Party Agreement on Arbitrator Selection

[Under Exchange Rules, the Director of Arbitration appoints the arbitrators, subject to the parties' peremptory challenges. The parties may agree on an alternative way to select arbitrators.] If all parties agree, they may select the arbitrators [themselves or decide how they will be selected. The Exchange will accommodate any reasonable alternative way to select arbitrators, provided the parties agree. The Exchange also offers two alternative ways to appoint arbitrators. The following is a brief description of each method] *according to Random List Selection, as described below.*

[(b) Random List Selection]

[1.] *(1) Random List Selection*—The Number and Type of Arbitrators

(i) Claims up to $25,000. One public arbitrator*, unless the customer or non-member requests a securities industry arbitrator,* will decide claims up to $25,000 (not including costs and interest).

(ii) Claims above $25,000 or where no dollar amount is claimed or disclosed. Three arbitrators will decide claims above $25,000 (not including costs and interest) or where no dollar amount is claimed or disclosed. The arbitration panel shall consist of a majority of public arbitrators, unless the customer or non-member requests a majority from the securities industry.

(iii) How we classify arbitrators. A securities industry arbitrator is defined in NYSE Rule 607(a)(2). A public arbitrator is defined in NYSE Rule 607(a)(3). See also NYSE Guidelines for Classification of Arbitrators.

[2.] *(2)* Selecting Arbitrators [(in place of NYSE Rule 608 Notice of Selection of Arbitrators)]

(i) Lists of Arbitrators

[(1)] *(a)* If one arbitrator hears [a] *the* case, the Director of Arbitration will send each party a randomly-generated list *containing the names* of *three* public arbitrators, unless the customer or non-member requests *securities* industry arbitrators. *Each party may use one strike against this list.*

[(2)] *(b)* If three arbitrators [will] hear the case, the Director *of Arbitration* will send each party two randomly-generated lists[, one of public arbitrators and one of securities industry arbitrators]. *One list will contain the names of ten public arbitrators and the other list will contain the names of five securities industry arbitrators. If the customer or non-member requests a majority of securities industry*

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Although the proposed rule has not yet been published for comment, the Commission has received 1 comment letter, which is discussed below in note 3 and related text.

[4] *See* letter from Karen Kupersmith, Director of Arbitration, NYSE, to Catherine McGuire, Chief Counsel, Division of Market Regulation, Commission, dated August 16, 2004 (''Amendment No. 1''); and letter from Karen Kupersmith, Director of Arbitration, NYSE, to Catherine McGuire, Chief Counsel, Division of Market Regulation, Commission, dated October 5, 2004 (''Amendment No. 2'').

[5] The pilot program originally was set up for a two-year period. *See* Release No. 34–43214 (August 28, 2000), 65 FR 53247 (September 1, 2000) (SR–NYSE–2000–34) (order approving pilot program). Upon expiration of the two-year period, NYSE renewed the pilot for an additional two years, which expired on July 31, 2004, and then again until January 31, 2005. *See* Release No. 34–46372 (August 16, 2002), 67 FR 54521 (August 22, 2002) (SR–NYSE–2002–30) (order approving first extension of pilot program); Release No. 34–49915 (June 25, 2004), 69 FR 39993 (July 1, 2004) (SR–NYSE–2004–28) (order approving second extension of pilot program).

arbitrators, one list will contain the names of ten securities industry arbitrators and the other list will contain the names of five public arbitrators. Each party may use four strikes against the list of ten arbitrators and two strikes against the list of five arbitrators.

(c) The strikes referred to in (a) and (b) above are in lieu of the peremptory challenges referenced in Rule 609.

[(3)] *(d)* With the lists, [you] *the parties* will also receive the arbitrators' biographical profile. [and his or her] *Upon request, the Exchange will send a party an* [arbitrators'] *arbitrator's* last three NYSE arbitration decisions, if any.

(ii) Any party may ask the Director *of Arbitration* for more information about a potential arbitrator. The request for additional information must be made within the ten business days the party has to return the lists as provided in [Section (b)(2)(iii)(1)] *(iii) below. This time period of ten business days is applicable to all requests for additional information in this Rule and Rule 608.* The NYSE shall send the arbitrator's response to all parties at the same time. The Director *of Arbitration* has discretion to limit the additional information requested from the arbitrator. The request for more information will toll the time for returning the lists to the Director *of Arbitration.*

(iii) [You] *Parties* must return [your] lists within ten business days.

[(1)] *(a)* [You] *Parties* must return [your] lists to the Director *of Arbitration* within ten business days of the date [you] received [them], unless extended by the tolling period. The Director *of Arbitration* may extend the deadline for returning the lists if [the Director] *he/she* finds a reasonable basis for the extension. *The parties may also agree to extend the deadline.* [You] *Parties* must:

- Strike through the names of any unacceptable arbitrators, *as limited by the number of strikes as set forth above,* and
- Rank the remaining names in order of [your] preference, with ''1'' being the arbitrator [that you] most strongly [prefer] *preferred.*

[(2)] *(b)* If [you do] *a party does* not return [your] lists on time, the Director *of Arbitration* will proceed as if all arbitrators on the lists are acceptable to [you] *that party.* The NYSE will invite arbitrators to serve in the order of the parties' mutual preferences. [We determine mutual] *Mutual* preferences *are* determined by adding together the numbers assigned to each arbitrator and selecting arbitrators with the lowest numbers first. In the event of a tie, arbitrators will be selected in alphabetical order.

[(iv) Second List, if necessary

(1) If the Exchange cannot select arbitrators from the remaining names, a second list will be sent to the parties. The second list will contain three names for each vacancy on the panel. On the second list, each party has one non-renewable peremptory challenge for each vacancy on the panel. Each party is to number the remaining names in order of its preference. You must return the list to the Director within ten business days of the date you received it. The NYSE will invite arbitrators to serve in the order of the parties' mutual preferences.]

[(2)] *(c)* If no acceptable arbitrators are left on the [second list] *lists,* the Director *of Arbitration* will randomly appoint arbitrators. The Director *of Arbitration* will also randomly appoint one or more arbitrators if: (i) Acceptable arbitrators are unable to serve; or (ii) arbitrators cannot be found on the lists for any other reason.

[3.] *(3)* Objecting to Potential Arbitrators

([a] *i*) Multiple Parties. In cases where there are two or more people designated as claimants, respondents and/or third party respondents, each group so designated will share one set of strikes. The Director of Arbitration may allow additional strikes if [the Director] *he/she* determines that justice would be served by doing so.

([b] *ii*) Challenges for Cause. [You] *Parties* have an unlimited number of challenges for cause. The Director *of Arbitration* will determine *in accordance with Rule 609(b)* whether to grant a challenge for cause. If any arbitrator is removed from the list ''for cause'' before the expiration of the time to return the lists, a replacement name will be provided.

[4.] *(4)* Filling Vacancies of Arbitrators

([a] *i*) Vacancies before the first hearing. If an arbitrator must withdraw before the first hearing, the Director *of Arbitration* will invite the next arbitrator on the parties' lists to fill the vacancy. If there are no remaining names, or if the vacancy cannot be filled from the names on the lists, the Director *of Arbitration* will randomly appoint an arbitrator. [You] *A party* will receive the arbitrator's biographical profile*, and upon request,* [and] his or her last three NYSE arbitration decisions, if any, for the last 10 years *(see 2.(i)(d)).* [You] *A party* may ask the Director *of Arbitration* for additional information on the proposed arbitrator's background*, and* [You] may challenge the arbitrator for cause.

([b] *ii*) Vacancies after the hearing starts. This circumstance is governed by NYSE Rule 611.

[5.] *(5)* Disclosures

After the Exchange assembles a complete panel of arbitrators, the Exchange will notify the arbitrators of their appointment. The Exchange will advise the parties of any information disclosed by the arbitrators under Rule 610 (Disclosures Required by Arbitrators).

[(c) Enhanced List Selection

I. The Number and Type of Arbitrators

The Exchange will provide the parties with the names and profiles of six ''Public'' and three ''Securities'' arbitrators, unless the customer or non-member requests a majority of industry arbitrators. The Exchange will screen potential arbitrators for conflicts and availability and, if applicable, employment law experience or training, or other applicable expertise. The Director of Arbitration will advise the parties of any information disclosed by the arbitrators under Rule 610 (Disclosures Required by Arbitrators).

II. Selecting Arbitrators

(a) You Must Return Your Lists Within Ten Business Days

You must return your lists within ten business days. You will have ten business days from receipt of the lists to strike up to three names and number the remaining names, in order of their preference. The number ''1'' signifies the arbitrator that you most strongly prefer. The Exchange will appoint three arbitrators (two public and one securities) using the combined preference rankings of the parties. If a party does not return the lists within ten business days, the Exchange will consider all arbitrators on the lists as acceptable. If there is a tie in the rankings, the Exchange will invite arbitrators to serve in alphabetical order.

(b) Administrative Appointment

If an arbitrator is unable to serve, the Exchange will contact the next arbitrator from the remaining names on the lists. If the lists have been exhausted, the Exchange will appoint an arbitrator from outside the list. When the Exchange appoints an arbitrator, each party has one peremptory challenge for each arbitrator the Exchange appoints. A party must use a peremptory challenge within ten business days of receiving notice of the appointment of the arbitrator.

III. Multiple Parties

In cases where there are two or more people designated as claimants, respondents or third party respondents, each group so designated will share one set of strikes and/or one peremptory challenge. The Director of Arbitration may allow additional peremptory

challenges if he determines that justice would be served by doing so.

IV. Challenges for Cause

The parties have unlimited challenges for cause. The Director of Arbitration will decide whether to grant a challenge for cause. If any arbitrator is removed from the list ''for cause'' before the end of the time to return the lists, the Director of Arbitration will provide the parties with a replacement name.]

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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 self-regulatory organization included statements concerning the purpose of and basis for the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below and is set forth in Sections A, B and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE currently has several methods by which arbitrators are assigned to cases, including the traditional method pursuant to NYSE Rule 607, by which NYSE staff appoints arbitrators to cases. On August 1, 2000, NYSE implemented a pilot program to allow parties, on a voluntary basis, to select arbitrators under other alternative methods (in addition to the traditional method). The first alternative under the pilot is the Random List Selection method, by which the parties are provided randomly generated lists of public and securities industry arbitrators. The parties have ten days to strike and rank the names on the lists. Based on mutual ranking of the lists, the highest-ranking arbitrators are invited to serve on the case. If a panel cannot be generated from the first list, a second list is generated and sent to the parties, which provides three potential arbitrators for each vacancy and allows each party to use one peremptory challenge for each vacancy. If vacancies remain after the second list has been processed, arbitrators are randomly assigned by NYSE staff to serve, subject only to challenges for cause.

The second alternative method under the pilot is Enhanced List Selection, in which six public and three securities classified arbitrators are selected for lists by NYSE staff, based on the arbitrators' qualifications and expertise. The lists are sent to the parties. The parties are permitted to use a limited number of strikes and are required to rank the arbitrators not stricken. Based on mutual ranking of the lists, the highest-ranking arbitrators are invited to serve on the case.

Under the pilot program, the Exchange also will accommodate the use of any reasonable alternative method of selecting arbitrators that the parties decide upon, provided that the parties agree. Absent agreement to the use of Random List Selection, Enhanced List Selection, or any other reasonable alternative method, the traditional method is used.

The proposed rule change retains the traditional method of staff appointment of arbitrators and makes permanent a modified form of the Random List Selection currently in use. One of the modifications specifies that, for arbitrations involving a three-member panel, parties will be provided with randomly generated lists containing the names of 10 public and 5 securities industry arbitrators from which the parties may choose. The customer or non-member may request, however, that the panel consist of a majority of securities industry arbitrators. In that case, the parties will be provided with lists containing the names of 10 securities industry and 5 public arbitrators. In contrast, the pilot did not specify the numbers or types of arbitrators to be included on the lists. The proposed rule change also limits the number of strikes the parties may use: 4 against the public arbitrators and 2 against the securities industry arbitrators. Further, in order to simplify and shorten the appointment process, the proposed rule change eliminates the process of providing a second list of arbitrators to the parties in the event they cannot agree to a panel from the first list.

For simplified arbitrations (*i.e.,* those involving a one-member panel), the proposed rule change clarifies that the randomly generated selection list will contain the names of 3 arbitrators. These arbitrators will be public arbitrators, unless the customer or non-member requests otherwise. Each party may use 1 strike.

For simplified as well as non-simplified arbitrations, the proposed rule change gives the parties greater flexibility by permitting them to agree to extend the deadline in which to return their lists (*i.e.,* beyond the prescribed 10 business days). As under the pilot program, the parties must all agree to use Random List Selection, or the traditional method will be used. Finally, the proposed rule change provides that descriptions of an arbitrator's last 3 awards will be sent to a party only upon the party's request, thus eliminating unnecessary paperwork generated by the current rule. Parties now may view all awards on the NYSE Web site, which in effect provides greater access to information than before.

In that parties have rarely requested Enhanced List Selection or other alternative methods offered under the pilot program, NYSE is not proposing to make them permanent parts of NYSE's arbitrator selection program.

2. Statutory Basis

NYSE believes the proposed changes are consistent with Section 6(b)(5) of the Act,[6] in that they promote just and equitable principles of trade by ensuring that members and member organizations and the public have a fair and impartial forum for the resolution of their disputes.

B. Self-Regulatory Organization's Statement on Burden on Competition

NYSE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

NYSE has neither solicited nor received written comments on the proposed rule change. The Commission has received, however, one comment letter from PIABA prior to the publication of the proposed rule filing.[7] The comment letter states that PIABA will have several comments on the substance of the proposed rule when it is published for comment and generally objects to the NYSE's failure to involve any participants in the arbitration process in the formulation of the proposed rule change prior to its filing with the Commission. At the Commission staff's request, NYSE has agreed to extend the comment period for the proposed rule change from 21 days to 45 days from its publication in the **Federal Register**.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i)

[6] 15 U.S.C. 78f(b)(5).

[7] *See* letter from Charles Austin, Jr., President, Public Investors Arbitration Bar Association, to Catherine McGuire, Chief Counsel, Division of Market Regulation, Commission, dated June 23, 2004.

as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change as amended 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*. Please include File Number SR–NYSE–2004–29 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–2004–29. 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, 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–2004–29 and should be submitted on or before December 2, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated Authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–2708 Filed 10–18–04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50527; File No. SR–PCX–2004–92]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Relating to the Options Floor Access Fee and the Remote Market Maker Access Fee

October 13, 2004.

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 October 1, 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, II and III below, which Items have been prepared by the Exchange. 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 make a clarifying change to the PCX Schedule of Fees and Charges (''Schedule'') with respect to the Options Floor Access Fee and the Remote Market Maker Access Fee. The text of the proposed rule change is available at the Office of the Secretary, 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 self-regulatory organization 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 self-regulatory organization 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 make a clarifying change to the Schedule with respect to its Options Floor Access Fee and its Remote Market Maker Access Fee. Currently, all registered floor personnel (including Lead Market Makers, Floor Market Makers, etc.) are assessed a monthly fee of $130 for access to the Exchange with a cap of $5,000 per month per Firm. Remote Market Makers are also assessed an identical fee for their access to the Exchange. Hence, whether a Remote Market Maker accesses the Exchange from the trading floor or from off the trading floor, such Remote Market Maker is accessed one access fee of $130 per month. Since the fees are identical, the Exchange proposes to combine the two fees into one and name it ''Options Access Fee.'' The Exchange believes that combining the two access fees will provide greater clarity and simplify the rate schedule.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act[3] in general, and furthers the objectives of Section 6(b)(4)[4] in particular, because it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among the Exchange's members, issuers and other persons using its facilities.

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 purposes of the Act.

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(4). At the request of the PCX, the Commission staff corrected the statutory basis provided in the original filing from Section 6(b)(5) to Section 6(b)(4) of the Act. Telephone conversation between Tania J.C. Blanford, Staff Attorney, PCX and Jennifer C. Dodd, Attorney, Division of Market Regulation, Commission on October 12, 2004.