



RULE
ADOPTION
NOTICE

RAN-03-12
May 1, 2003

TO: All PCX Members and Member Organizations

FROM: Department of Regulatory Policy

SUBJECT: Arbitration Program
(File No. SR-PCX-2003-13)

On April 11, 2003 the Pacific Exchange, Inc. ("PCX") filed with the Securities and Exchange Commission a proposal to amend its rules regarding its Arbitration Program. On April 24, 2003 the Commission approved the PCX's proposed rule change.

The following is the text of the rule change. Questions regarding this bulletin may be directed to Betsy James at (415) 393-4151.

* * *

EXHIBIT A

Text of the Rule Change:¹

PCX RULE 12

Arbitration

Matters Subject to Arbitration

Rule 12.1(a) - (g) - No change.

Commentary:

.01 No change.

.02 It may be deemed conduct inconsistent with just and equitable principles of trade

for a member, a member organization or a person associated with a member or member organization to:

- (a) fail to submit to arbitration on demand under the provisions of this Rule[.];
- (b) fail to waive the California Rules of Court, Division VI of the Appendix, entitled “Ethics Standards for Neutral Arbitrators in Contractual Arbitration” (the “California Standards”), if all the parties in the case who are customers have waived application of the California Standards in that case; or to fail to waive the California Standards if all associated persons with a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute have waived application of the California Standards in that case;
- (c) fail to waive any claims against the Exchange that the conduct of the arbitration violates the California Code of Civil Procedure Section 1281.92 (“CCCP Claims”), if all the parties in the case who are customers have waived the CCCP Claims in that case; or to fail to waive the CCCP Claims if all associated persons with a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute have waived the CCCP Claims in that case; [or]
- (d) to fail to appear or to provide any document in his or its possession or control as directed pursuant to the provisions of this Rule; or
- (e) to fail to honor an award of arbitrators properly rendered pursuant to the provisions of this Rule where a timely motion has not been made to vacate or modify such award pursuant to applicable law.

.03 No change.

* * *

Rule 12.35 Applicability of Arbitration Rules

¹ New text is underscored; deleted text is in brackets.

(a) Reserved.

(b) Arbitrations Filed Prior to April 24, 2003. Arbitration claims that were filed prior to [insert Approval Date] and remain pending will be administered as follows:

(i) The arbitration claim will be administered in accordance with Rules 12.1 through 12.34 if:

(A) arbitrator(s) have been appointed as of April 24, 2003; and

(B) all parties to the arbitration have waived, without condition and in the form required by the Exchange, the application of the California Standards and the CCCP Claims (as defined in Commentary .02 of Rule 12.1).

* * *

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 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

PCX makes every effort to serve investors who bring their claims to PCX by providing a fair, efficient, and economical arbitration forum. Recent changes in California law and the attendant litigation, however, have caused PCX to reevaluate the continuance of its arbitration program. Specifically, California recently adopted (1) Section 1281.92 of the California Code of Civil Procedure (“CCCP 1281.92”), which prohibits private arbitration providers from administering arbitrations, or providing any other services related to arbitration, if any party or attorney for a party has, or has had within the preceding year, any type of financial interest in the arbitration provider, and (2) the California Standards, which require arbitration providers to implement and maintain substantial new recordkeeping and disclosure requirements. CCCP 1281.92 became effective on January 1, 2003. Since their adoption, CCCP 1281.92 and the California Standards have become the subject of controversy or, in some cases, litigation regarding their interpretation and application to arbitration programs administered by self-regulatory organizations.² To minimize any potential financial and litigation risk associated with these new provisions, PCX has decided to implement certain changes to its arbitration rules. In this regard, PCX has developed a plan for the future handling of pending arbitration claims as well as any new arbitration claims raised under PCX rules.

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See, e.g., Brief of the Securities and Exchange Commission, Amicus Curiae, in Support of Plaintiffs’ Motion for Declaratory Judgment, NASD Dispute Resolution, Inc. and New York Stock Exchange, Inc., v. Judicial Council of California (arguing that the California Standards conflict with, and thus are preempted by, the Commission’s regulation of SRO arbitration under the Exchange Act and by the Federal Arbitration Act). The brief is available on the Commission Web site at: www.sec.gov/litigation/briefs/nasddispute.pdf. See also Securities Exchange Act Release No. 46881 (Nov. 21, 2002) (describing the controversy regarding new California arbitration provisions).

As one part of this plan, the PCX intends to expeditiously proceed with the administration of pending arbitrations in which arbitrators have been appointed as of the Approval Date.³ Because PCX has a strong desire to accommodate the parties to these arbitrations, these matters will be permitted to continue under the existing PCX arbitration rules. However, given the uncertain legal environment in California, PCX would require the parties to these arbitrations to waive the California Standards and CCCP Claims in order for the arbitrations to continue pursuant to PCX Rules 12.1 - 12.34.

Once this proposed rule filing is effective, PCX will notify parties to this subset of pending arbitrations of the rule change and provide them with the option of waiving the California Standards and the CCCP Claims. PCX will provide them with the waiver forms and the opportunity to speak with PCX staff if they desire more information regarding this option.

At the same time, PCX will notify industry parties in this same subset of cases that they must waive the California Standards and the CCCP Claims if the investor, or the associated person with a claim of statutory employment discrimination, agrees to a waiver. Industry parties in such cases will be required to execute waiver agreements. An industry party's failure to sign the waiver as required by the proposed rule change will be referred for disciplinary action.

2. Statutory Basis

PCX believes that the proposed rule change is consistent with the provisions of Section 6(b)(5) of the Exchange Act,⁴ which requires that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable

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This rule filing addresses this subset of pending cases. PCX intends to address how other pending arbitration claims as well as new arbitration claims will be handled in a separate rule filing.

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15 U.S.C. 78f(b)(5).

principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transaction in securities, and, in general, to protect investors and the public interest.

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

PCX 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.

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

Written comments on the proposed rule change were neither solicited nor received.

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

The Exchange has requested that the Commission find good cause pursuant to Section 19(b)(2) of the Act for approving the proposed rule change prior to the 30th day after publication in the Federal Register. The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder. The Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of notice of filing thereof in that accelerated approval is necessary for the protection of investors to ensure that the administration of arbitrations continues despite the changes to California law that became effective as of January 1, 2003.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. 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 in Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the PCX. All submissions should refer to File No. SR-PCX-2003-13 and should be submitted by _____, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁵

Jonathan G. Katz
Secretary

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17 CFR 200.30-3(a)(12).

Exhibit A

ARBITRATION WAIVER AGREEMENT

This ARBITRATION WAIVER AGREEMENT (this "Agreement") is entered into by and between Pacific Exchange, Inc. ("Exchange") and _____, _____, and _____ (collectively, "Party"), on this ___ day of _____ (the "Execution Date"). Party is a party to Arbitration No. _____ (the "Arbitration Matter").

In consideration of the mutual promises set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Exchange and Party hereto agree as follows:

1. Continuation of Arbitration Services. Party desires Exchange to continue to administer the Arbitration Matter pursuant to the Exchange's Arbitration Program, notwithstanding any contrary substantive or procedural law, including, but not limited to, the potential applicability of Section 1281.92 of the California Code of Civil Procedure section 1281.92, as added by Stats. 2002, c. 952 (A.B. 2574), operative January 1, 2003 ("CCCP 1281.92"). If all parties to the Arbitration Matter and such parties' counsel, if applicable, execute this Agreement, Exchange shall continue to so administer the Arbitration Matter. For the purposes of this Agreement, "Arbitration Program" shall mean the arbitration services provided by the Exchange in accordance with Exchange Rules 12.1-12.34, as in effect as of the Execution Date and as may be amended from time to time.
2. Release of Claims by Party. As a material inducement to Exchange to enter into this Agreement, Party, as a knowing and voluntary act, hereby forever releases, acquits and discharges Exchange from, and covenants not to sue Exchange for, or to participate in, assist any third party (including but not limited to any governmental authority) in, or take any action to encourage or induce any third party to bring, any and all Claims (as hereinafter defined) based on, related to or otherwise associated with CCCP 1281.92 or the provisions thereof, which Party or any third party has or may have against Exchange, known or unknown, existing or inchoate, asserted or unasserted. In signing this Agreement, Party acknowledges that at least one party to the Arbitration Matter is a member of the Exchange, and, therefore, could be interpreted as having a financial interest in the Exchange within the meaning of CCCP 1281.92. For purposes of this Agreement, "Claims" shall mean any and all debts, obligations, demands, causes of action, disputes, judgments, controversies, and claims of any kind or nature whatsoever, whether sounding in contract, statute, tort, law, equity or any other legal theory, and all other applicable federal, state, and local statutes, ordinances, rules, and regulations.

In addition, and without limiting in any way the scope of the waiver and release set forth in

the foregoing paragraph, the Party specifically agrees not to assert, in any forum, that non-compliance with CCCP 1281.92 is a basis for challenging the validity of any arbitrator or of any arbitration award, whether asserted during the arbitration proceeding or after an arbitration award has been issued.

3. Governing Law. This Agreement shall be governed by, and construed in accordance with federal law, including but not limited to the Federal Arbitration Act (9 U.S.C. § 1), the Securities Act of 1933, the Securities Exchange Act of 1934 and the rules promulgated thereunder. To the extent that recourse to state law is needed, this Agreement shall be governed by the substantive laws of California.
4. Unknown or Unsuspected Consequences. Party understands and acknowledges that this waiver and release applies to and includes all unknown or unsuspected consequences or results arising from or relating to the Party's waiver set forth herein in connection with this Arbitration Matter. Party represents and warrants that they have read the contents of California Civil Code section 1542, which provides as follows:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected this settlement with the debtor.”

PARTY EXPRESSLY WAIVES ANY AND ALL RIGHTS AND BENEFITS UNDER CALIFORNIA CIVIL CODE SECTION 1542.

5. Attorneys' Fees. In the event of any default or breach of this Agreement, or any action brought to interpret or enforce this Agreement, the prevailing party shall be entitled to recover its attorneys' fees and costs incurred in such action.
6. Entire Agreement. This Agreement supersedes all prior written and oral understandings, promises, and agreements between the parties hereto as to the subject matter contained in this Agreement. This Agreement constitutes the entire agreement between the parties hereto and may be amended, modified or superseded only by a written agreement signed by both parties hereto and is binding on the parties hereto and their respective successors, assigns, and personal representatives.
7. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

PACIFIC EXCHANGE, INC.

By: _____

Title: _____

Date: _____

PARTY

Date: _____

Date: _____

Claimant(s):

Respondent(s): (Print here)

Claimant (print name and sign above)

Counsel for Respondent

Claimant (print name and sign above)

Counsel for Respondent

Counsel for Claimant

Counsel for Respondent

Counsel for Claimant

Add Signature Lines if additional space needed.