

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-50170; File No. SR-PCX-2004-56)

August 9, 2004

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 to the Proposed Rule Change by the Pacific Exchange, Inc. Relating to the Certificate of Incorporation and Bylaws of Archipelago Holdings, Inc.

I. Introduction

On June 28, 2004, the Pacific Exchange, Inc. (“PCX” or “Exchange”), through its wholly owned subsidiary PCX Equities, Inc. (“PCXE”), 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 relating to the Certificate of Incorporation and Bylaws of Archipelago Holdings, Inc. (“New Arca Holdings”). The proposed rule change was published for comment in the Federal Register on July 7, 2004.<sup>3</sup> The Commission received no comments on the proposal. On August 3, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> This order approves the proposed rule change, grants accelerated approval to Amendment No. 1 to the proposed rule change, and solicits comments from interested persons on Amendment No. 1.

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<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. 49946 (June 30, 2004), 69 FR 41009 (“Notice”).

<sup>4</sup> See letter from Mai S. Shiver, Director/Senior Counsel, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation (“Division”), Commission, dated August 2, 2004 (“Amendment No. 1”). In Amendment No. 1, the Exchange clarified the intent of the drafters regarding the interpretation of “beneficial ownership” and any variation thereof, made other technical corrections to the text of the proposed rule change, and requested accelerated approval of Amendment No. 1.

## II. Description of the Proposal

### A. Corporate Organization of New Arca Holdings

Currently, the equities trading facility of PCX and PCXE, the Archipelago Exchange (“ArcaEx”), is owned and operated by Archipelago Exchange, L.L.C., which, in turn, is owned by Archipelago Holdings, L.L.C. (“Current Arca Holdings”). Current Arca Holdings is proposing to convert into New Arca Holdings, a Delaware corporation, and effect an initial public offering of the common stock of New Arca Holdings.<sup>5</sup> Current Arca Holdings is currently the sole owner of ArcaEx. As a result of the conversion of Current Arca Holdings into New Arca Holdings, New Arca Holdings will become the sole owner of ArcaEx.

The common stock of New Arca Holdings will have the traditional features of common stock, including voting, dividend and liquidation rights. Subject to the limitations described below in Section II.B., holders of New Arca Holdings’ common stock will be entitled to vote on all matters submitted to the stockholders for a vote. New Arca Holdings will be permitted to issue preferred stock in the future, the terms of which would be determined by its board of directors (“Board”).

New Arca Holdings will be governed under the direction of the Board. The number of directors will be fixed by resolution of the Board, and is expected to be nine initially. Pursuant to Certificate of Incorporation of New Arca Holdings (“Certificate of Incorporation”), for so long

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<sup>5</sup> See Securities Act Registration Statement on Form S-1 filed by New Arca Holdings (File No. 333-113226) (“Registration Statement on Form S-1”). In connection with the conversion to a Delaware corporation, each current member of Current Arca Holdings will receive 0.222222 shares of common stock of New Arca Holdings for each share of Current Arca Holdings held by the member, and one of Current Arca Holdings’ members, GAP Archa Holdings, Inc., will be merged with and into New Arca Holdings. The stockholders of GAP Archa Holdings, Inc. will receive shares of common stock of New Arca Holdings for their shares of common stock of GAP Archa Holdings, Inc., and the shares of New Arca Holdings common stock owned by GAP Archa Holding, Inc. prior to the merger would be cancelled.

as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement among PCX, PCXE and Current Arca Holdings (“Amended and Restated Facilities Agreement”) is in effect, one member of New Arca Holdings’ Board will be required to be a member of board of directors of PCX or an officer or employee of PCX nominated by the board of directors of PCX. New Arca Holdings will have the following committees of the Board: an audit committee; a corporate governance and nominating committee; and a compensation committee.

According to the Exchange, certain provisions of the proposed Certificate of Incorporation and Bylaws of New Arca Holdings are intended to ensure that the conversion of the parent company of ArcaEx from a privately-owned limited liability company to a publicly-held Delaware corporation will not interfere with or restrict the ability of PCX or PCXE to carry out their self-regulatory obligations and the Commission to carry out its oversight responsibilities under the Act with respect to ArcaEx, and generally to enable ArcaEx to operate in a manner that complies with the federal securities laws, including furthering the objectives of Section 6(b)(5) of the Act.<sup>6</sup>

B. Voting Limitation

Pursuant to the Certificate of Incorporation, no person,<sup>7</sup> either alone or with its related persons (as defined below), would be entitled to (1) vote or cause the voting of shares of stock of New Arca Holdings to the extent such shares represent in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter (the “Voting Limitation”), or (2) enter into any agreement, plan or arrangement not to vote shares, the effect of which agreement, plan

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<sup>6</sup> 15 U.S.C. 78f(5).

<sup>7</sup> Section H(2) of Article Fourth of the Certificate of Incorporation defines “person” to mean a natural person, company, government, or political subdivision, agency, or instrumentality of a government.

or arrangement would be to enable any person, either alone or with its related persons, to vote or cause the voting of shares that would represent in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter (the “Nonvoting Agreement Prohibition”).

The Voting Limitation and the Nonvoting Agreement Prohibition would apply unless and until (1) a person, either alone or with its related persons, delivers to the Board a notice in writing, at least 45 days (or such shorter period to which the Board expressly consents) prior to the voting of any shares that would cause such person, either alone or with its related persons, to violate the Voting Limitation or the Nonvoting Agreement Prohibition, and (2) such person, either alone or with its related persons, receives prior approval from the Board and the Commission to exceed the Voting Limitation or enter into an agreement, plan or arrangement not otherwise allowed pursuant to the Nonvoting Agreement Prohibition. Specifically, (1) the Board would be required to adopt a resolution approving such person and its related persons to exceed the Voting Limitation or to enter into an agreement, plan or arrangement not otherwise allowed pursuant to the Nonvoting Agreement Prohibition, (2) the resolution would be required to be filed with the Commission as a proposed rule change under Rule 19b-4 of the Act, and (3) such proposed rule change must first become effective thereunder.<sup>8</sup>

In approving any such resolution, the Board would be required to determine that: (1) the exercise of such voting rights or the entering into of such agreement, plan or arrangement, as applicable, by such person, either alone or with its related persons, would not impair New Arca

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<sup>8</sup> Section C of Article Fourth of the Certificate of Incorporation. The Voting Limitation and the Nonvoting Agreement Prohibition would not apply to (1) any solicitation of any revocable proxy from any stockholder of New Arca Holdings by or on behalf of New Arca Holdings or by an officer or director of New Arca Holdings acting on behalf of New Arca Holdings or (2) any solicitation of any revocable proxy from any stockholder of New Arca Holdings by any other stockholder that is conducted pursuant to, and in accordance with, Regulation 14A promulgated pursuant to the Act. Id.

Holdings', PCX's or PCXE's ability to discharge its responsibilities under the Act and the rules and regulations thereunder and is otherwise in the best interests of New Arca Holdings and its stockholders; (2) the exercise of such voting rights or the entering into of such agreement, plan or arrangement would not impair the Commission's ability to enforce the Act; (3) such person and its related persons are not subject to any statutory disqualification (as defined in Section 3(a)(39) of the Act); and (4) such person and its related persons are not ETP Holders.<sup>9</sup> In making such determinations, the Board may impose any conditions and restrictions on such person and its related persons owning any shares of stock of New Arca Holdings entitled to vote on any matter as the Board in its sole discretion deems necessary, appropriate or desirable in furtherance of the objectives of the Act and the governance of New Arca Holdings.<sup>10</sup>

If votes are cast in excess of the Voting Limitation, New Arca Holdings will be required to disregard such votes cast in excess of the Voting Limitation.<sup>11</sup>

The Certificate of Incorporation would define "related persons" to mean with respect to any person: (1) any other person(s) whose beneficial ownership of shares of stock of New Arca Holdings with the power to vote on any matter would be aggregated with such first person's beneficial ownership of such stock or deemed to be beneficially owned by such first person pursuant to Rules 13d-3 and 13d-5 under the Act;<sup>12</sup> (2) in the case of a person that is a natural person, for so long as ArcaEx remains a facility of PCX and PCXE and the Amended and

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<sup>9</sup> PCXE Rule 1(n) currently defines an "ETP Holder" as a sole proprietorship, partnership, corporation, limited liability company or other organization in good standing that has been issued an Equity Trading Permit by PCXE for effecting approved securities transactions on the PCXE's trading facilities. An ETP Holder must be a registered broker or dealer pursuant to Section 15 of the Act.

<sup>10</sup> Section C of Article Fourth of the Certificate of Incorporation.

<sup>11</sup> Id.

<sup>12</sup> See 17 CFR 240.13d-3 and 240.13d-5.

Restated Facility Services Agreement is in full force and effect, any broker or dealer that is an ETP Holder with which such natural person is associated; (3) in the case of a person that is an ETP Holder, for so long as ArcaEx remains a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in full force and effect, any broker or dealer with which such ETP Holder is associated; (4) any other person(s) with which such person has any agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of shares of the stock of New Arca Holdings; and (5) in the case of a person that is a natural person, any relative or spouse of such person, or any relative of such spouse, who has the same home as such person or who is a director or officer of New Arca Holdings or any of its parents or subsidiaries.<sup>13</sup>

C Ownership Limitations

1. Concentration Limitation

Pursuant to the Certificate of Incorporation, no person, either alone or with its related persons, could own beneficially shares of stock of New Arca Holdings representing in the aggregate more than 40% of the then outstanding votes entitled to be cast on any matter.<sup>14</sup> The

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<sup>13</sup> Section H(3) of Article Fourth of the Certificate of Incorporation. The Certificate of Incorporation further provides that “related persons” includes, with respect to any person: (1) any other person beneficially owning pursuant to Rules 13d-3 and 13d-5 under the Act shares of stock of New Arca Holdings with the power to vote on any matter that also are deemed to be beneficially owned by such first person pursuant to Rules 13d-3 and 13d-5 under the Act; (2) any other person that would be deemed to own beneficially pursuant to Rules 13d-3 and 13d-5 under the Act shares of stock of New Arca Holdings with the power to vote on any matter that are beneficially owned directly or indirectly by such first person pursuant to Rules 13d-3 and 13d-5 under the Act; and (3) any additional person through which such other person would be deemed to directly or indirectly own beneficially pursuant to Rules 13d-3 and 13d-5 under the Act shares of stock of New Arca Holdings with the power to vote on any matter.

<sup>14</sup> Section D(1) of Article Fourth of the Certificate of Incorporation. In considering whether a person owns shares of stock of New Arca Holdings or has voted shares of stock of New Arca Holdings in violation of the applicable ownership and voting limitations, New Arca

40% ownership limitation would apply unless and until (1) a person, either alone or with its related persons, delivers to the Board a notice in writing, at least 45 days (or such shorter period to which the Board expressly consents) prior to the acquisition of any shares that would cause such person, either alone or with its related persons, to own beneficially shares of stock of New Arca Holdings in excess of the 40% ownership limitation, and (2) such person, either alone or with its related persons, receives prior approval from the Board and the Commission to exceed the 40% ownership limitation. Specifically, (1) the Board would be required to adopt a resolution approving such person and its related persons to exceed the ownership limitation, (2) the resolution would be required to be filed with the Commission as a proposed rule change under Rule 19b-4 of the Act and (3) such proposed rule change must first become effective thereunder.<sup>15</sup>

In approving any such resolution, the Board would be required to determine that: (1) such acquisition of beneficial ownership by such person, either alone or with its related persons, would not impair any of New Arca Holdings', PCX's or PCXE's ability to discharge its responsibilities under the Act and the rules and regulations thereunder and is otherwise in the best interests of New Arca Holdings and its stockholders; (2) such acquisition of beneficial ownership by such person, either alone or with its related persons, would not impair the Commission's ability to enforce the Act; and (3) such person and its related persons are not subject to any statutory disqualification (as defined in Section 3(a)(39) of the Act). In making such determinations, the Board may impose any conditions and restrictions on such person and

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Holdings will consider any filings made with the Commission under Section 13(d) and Section 13(g) of the Act by such person and its related persons and will aggregate all shares owned or voted by such person and its related persons to determine such person's beneficial ownership.

<sup>15</sup>

Id.

its related persons owning any shares of stock of New Arca Holdings entitled to vote on any matter as the board of directors of New Arca Holdings in its sole discretion deems necessary, appropriate or desirable in furtherance of the objectives of the Act and the governance of New Arca Holdings.<sup>16</sup>

If a person, either alone or with its related persons, owns beneficially shares of stock of New Arca Holdings in excess of the 40% limitation without obtaining the prior approval of the Board and the Commission, New Arca Holdings shall call from such person and its related persons that number of shares of stock entitled to vote that exceeds the 40% limitation at a price equal to the par value of the shares of stock.<sup>17</sup>

## 2. Limitation on Ownership by ETP Holders

For so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, no ETP Holder, either alone or with its related persons, could own beneficially shares of stock of New Arca Holdings representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter.<sup>18</sup> If an ETP Holder, either alone or with its related persons, owns beneficially shares of stock of New Arca Holdings in excess of this 20% limitation, New Arca Holdings shall call from such ETP Holder and its

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<sup>16</sup> Id.

<sup>17</sup> Id. New Arca Holdings would be required to call the number of shares of stock of New Arca Holdings from such person and its related persons necessary to decrease the beneficial ownership of such person and its related persons to 40% of the outstanding shares of stock entitled to vote on any matter after giving effect to the redemption of the shares.

<sup>18</sup> Section D(2) of Article Fourth of the Certificate of Incorporation.

related persons that number of shares of stock entitled to vote that exceeds the 20% limitation at a price equal to the par value of the shares of stock.<sup>19</sup>

Members of Current Arca Holdings who were ETP Holders as of the date of the Certificate of Incorporation, either alone or with their related persons, would have a temporary exemption, not to extend past July 31, 2014, from this ownership limitation to the extent of their beneficial ownership, either alone or with their related persons, of shares of stock of New Arca Holdings after giving effect to the initial public offering of shares of common stock of New Arca Holdings.<sup>20</sup> Members of Current Arca Holdings qualifying for this exemption would not be allowed to increase their beneficial ownership of New Arca Holdings above their beneficial ownership at the time of the initial public offering.<sup>21</sup>

New Arca Holdings shall not register the purported transfer of any shares of stock of New Arca Holdings that would result in a violation of the 40% ownership limitation and the 20% ownership limitation applicable to ETP Holders.<sup>22</sup> In practical terms, this limitation would apply only in situations where a stockholder is the record owner of shares.<sup>23</sup>

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<sup>19</sup> Id. New Arca Holdings would be required to call the number of shares of stock of New Arca Holdings from such person and its related persons necessary to decrease the beneficial ownership of such person and its related persons to 20% of the outstanding shares of stock entitled to vote on any matter after giving effect to the redemption of the shares.

<sup>20</sup> According to Current Arca Holdings, only one of its members that is an ETP Holder owns more than 20% of the shares of Current Arca Holdings.

<sup>21</sup> Section D(2) of Article Fourth of the Certificate of Incorporation.

<sup>22</sup> Section D(3) of Article Fourth of the Certificate of Incorporation.

<sup>23</sup> For the purposes of the 40% ownership limitation and the 20% ownership limitation applicable to ETP Holders, no person would be deemed to have any agreement, arrangement or understanding to act together with respect to voting shares of stock of New Arca Holdings solely because such person or any of such person's related persons has or shares the power to vote or direct the voting of such shares of stock pursuant to a revocable proxy given in response to a public proxy or consent solicitation conducted pursuant to, and in accordance with, Regulation 14A promulgated pursuant to the Act,

D. New Arca Holdings' Right to Require Information from Stockholders

Pursuant to the Certificate of Incorporation, the Board would have the right to require any person and its related persons reasonably believed (1) to be subject to the Voting Limitation or the Nonvoting Agreement Prohibitions, (2) to own beneficially shares of stock of New Arca Holdings entitled to vote on any matter in excess of the 40% ownership limitation, (3) to own beneficially an aggregate of 5% or more of the then outstanding shares of stock of New Arca Holdings entitled to vote on any matter, which ownership such person, either alone or with its related persons, has not reported to New Arca Holdings, (4) to be subject to the ownership limitation applicable to ETP Holders described above, or (5) to own shares of stock of New Arca Holdings entitled to vote on any matter in excess of 20% that is subject to any statutory disqualification (as defined in Section 3(a)(39) of the Act) to provide New Arca Holdings complete information as to all shares of stock of New Arca Holdings beneficially owned by such person and its related persons and any other factual matter relating to the applicability or effect of the ownership and voting limitations described above as may reasonably be requested of such person and its related persons.<sup>24</sup>

E. Responsibilities of the Directors

Pursuant to the Certificate of Incorporation, in discharging his or her responsibilities as a member of the Board, each director will be required to take into consideration the effect that New Arca Holdings' actions would have on the ability of PCX and PCXE to carry out their responsibilities under the Act and on the ability of PCX, PCXE and New Arca Holdings to engage in conduct that fosters and does not interfere with PCX's, PCXE's and New Arca

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except if such power (or the arrangements relating thereto) is then reportable under Item 6 of Schedule 13D under the Act (or any similar provision of a comparable or successor report). Section D(4) of Article Fourth of the Certificate of Incorporation.

<sup>24</sup> Section G of Article Fourth of the Certificate of Incorporation.

Holdings' ability to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest.<sup>25</sup> In addition, in discharging his or her responsibilities as a member of the Board, each director shall comply with the federal securities laws and rules and regulations thereunder and cooperate with the Commission, and, for so long as ArcaEx is a facility of PCX and PCXE the Amended and Restated Facility Services Agreement is in effect, with PCX and PCXE pursuant to their regulatory authority.<sup>26</sup>

F. Qualifications of Directors, Officers and Significant Stockholders

Pursuant to the Certificate of Incorporation, no person subject to any statutory disqualification (as defined in Section 3(a)(39) of the Act) may be a director or officer of New Arca Holdings or may own shares of stock of New Arca Holdings representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter.<sup>27</sup> If such person, either alone or with its related persons, owns beneficially shares of stock of New Arca Holdings in violation of this 20% limitation, New Arca Holdings shall call from such person and its related persons that number of shares of stock entitled to vote that exceeds the 20% limitation at a price equal to the par value of the shares of stock.<sup>28</sup>

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<sup>25</sup> Article Tenth of the Certificate of Incorporation.

<sup>26</sup> Id.

<sup>27</sup> Section E of Article Fourth and Article Ninth of the Certificate of Incorporation,.

<sup>28</sup> Section E of Article Fourth of the Certificate of Incorporation. New Arca Holdings would be required to call the number of shares of stock of New Arca Holdings from such person and its related persons necessary to decrease the beneficial ownership of such

G. PCX Director

Pursuant to the Certificate of Incorporation, for so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, one member of New Arca Holdings' Board shall be a member of PCX's board of directors or an officer or employee of PCX nominated by the PCX board of directors. If at any time there is not a director who is a member of PCX's board of directors or an officer or employee of PCX nominated by the PCX board of directors on the Board of New Arca Holdings, the Board of New Arca Holdings shall appoint a director nominated by the PCX board of directors.<sup>29</sup>

H. Compliance with Laws and Regulations by Officers and Employees

Pursuant to the Certificate of Incorporation, in discharging his or her responsibilities as an officer or employee of New Arca Holdings, each officer or employee shall comply with the federal securities laws and rules and regulations thereunder and shall cooperate with the Commission, and, for so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, with PCX and PCXE pursuant to their regulatory authority.<sup>30</sup>

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person and its related persons to 20% of the outstanding shares of stock entitled to vote on any matter after giving effect to the redemption of the shares.

<sup>29</sup> Article Eighth of the Certificate of Incorporation.

<sup>30</sup> Article Tenth of the Certificate of Incorporation.

I. Confidential Information and Books and Records

Pursuant to the Certificate of Incorporation, all confidential information pertaining to the self-regulatory function of PCX and PCXE (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in books and records of PCX or PCXE that shall come into the possession of New Arca Holdings shall: (1) not be made available to any persons (other than as provided in the next two sentences) other than to those officers, directors, employees and agents of New Arca Holdings that have a reasonable need to know the contents thereof; (2) be retained in confidence by New Arca Holdings and the officers, directors, employees and agents of New Arca Holdings; and (3) not be used for any commercial purposes. Nothing in the Certificate of Incorporation, including this provision of confidential information, shall be interpreted to limit or impede the rights of the Commission, and, for so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, PCX and PCXE, to access and examine such confidential information pursuant to the federal securities laws and rules and regulations thereunder, or to limit or impede the ability of any officers, directors, employees or agents of New Arca Holdings to disclose such confidential information to the Commission and, for so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, to PCX and PCXE.<sup>31</sup>

New Arca Holdings' books and records shall be subject at all times to inspection and copying by the Commission, and, for so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, by PCX and PCXE, provided that, in the case of PCX and PCXE, such books and records are related to the operation or

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<sup>31</sup> Article Fourteenth of the Certificate of Incorporation.

administration of ArcaEx as a facility of PCX and PCXE.<sup>32</sup> In addition, New Arca Holdings' books and records relating to ArcaEx shall be maintained within the United States.<sup>33</sup>

J. Commission and PCX Jurisdiction

New Arca Holdings, its directors and officers, and those of its employees whose principal place of business and residence is outside of the United States, shall be deemed to irrevocably submit to the exclusive jurisdiction of the United States federal courts, the Commission, and, for so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, PCX, for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws, and the rules and regulations thereunder, arising out of, or relating to, the activities of ArcaEx, and New Arca Holdings and each such director, officer or employee, in the case of any such director, officer or employee by virtue of his acceptance of any such position, shall be deemed to waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission, that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter thereof may not be enforced in or by such courts or agency.<sup>34</sup>

For so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, the books, records, premises, officers, directors and employees of New Arca Holdings shall be deemed to be the books, records, premises, officers,

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<sup>32</sup> Article Fifteenth of the Certificate of Incorporation.

<sup>33</sup> Article Fourteenth of the Certificate of Incorporation.

<sup>34</sup> Article Thirteenth of the Certificate of Incorporation.

directors and employees of PCX and PCXE for purposes of and subject to oversight pursuant to the Act.<sup>35</sup>

From and after the consummation of the initial public offering of shares of common stock of New Arca Holdings, New Arca Holdings shall take reasonable steps necessary to cause its officers, directors and employees prior to accepting a position as an officer, director or employee, as applicable, to consent in writing to the applicability to them of Article Tenth, Article Thirteenth and Article Fifteenth of the Certificate of Incorporation, as applicable, with respect to their activities related to ArcaEx, it being understood that prior to the consummation of the initial public offering, New Arca Holdings shall have taken reasonable steps necessary to cause persons holding such positions prior to the consummation of the initial public offering to consent in writing to the applicability to them of such provisions, as applicable, prior to the consummation of the initial public offering.<sup>36</sup> Thus, pursuant to this provision, New Arca Holdings will require its directors and officers, and those of its employees whose principal place

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<sup>35</sup> Article Fifteenth of the Certificate of Incorporation.

<sup>36</sup> Article Eighteenth of the Certificate of Incorporation.

Article Tenth of the Certificate of Incorporation requires that, subject to certain conditions, each director of New Arca Holdings take into consideration the effect that New Arca Holdings' actions would have on the ability of PCX and PCXE to carry out their regulatory responsibilities and requires directors, officers and employees of New Arca Holdings to comply with federal securities laws and to cooperate with the Commission, PCX and PCXE.

Article Thirteenth of the Certificate of Incorporation requires that, subject to certain conditions, New Arca Holdings, its directors and officers, and those of its employees whose principal place of business and residence is outside of the United States submit to the jurisdiction of the Commission and PCX and to waive all claims that it or they are not personally subject such jurisdiction.

Article Fifteenth of the Certificate of Incorporation states that, subject to certain conditions, the books, records, premises, officers, directors and employees of New Arca Holdings shall be deemed to be the books, records, premises, officers, directors and employees of PCX and PCXE.

of business and residence is outside of the United States, to consent explicitly to the jurisdiction of the United States courts, the Commission and PCX. In addition, New Arca Holdings will require its officers, directors and employees to agree to cooperate with the Commission, PCX and PCXE and agree to be deemed to be officers, directors and employees of PCX and PCXE.

K. Responsibilities of New Arca Holdings

Pursuant to the Certificate of Incorporation, New Arca Holdings shall comply with the federal securities laws and rules and regulations thereunder and shall cooperate with the Commission, and, for so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, with PCX and PCXE pursuant to their regulatory authority.<sup>37</sup> In addition, New Arca Holdings shall take reasonable steps necessary to cause its agents to cooperate with the Commission, and, for so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, with PCX and PCXE pursuant to their regulatory authority with respect to such agents' activities related to ArcaEx.<sup>38</sup>

L. Amendments to the Certificate of Incorporation and Bylaws

Pursuant to the Certificate of Incorporation and the Bylaws of New Arca Holdings, for so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, any amendment to the Certificate of Incorporation or Bylaws of New Arca Holdings must be submitted by the Board to the board of directors of PCX and, if the board of directors of PCX determines that an amendment to the Certificate of Incorporation or the Bylaws of New Arca Holdings must be filed with, or filed with and approved by, the Commission as a rule change pursuant to Section 19 of the Act and Rule 19b-4 thereunder, such

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<sup>37</sup> Article Sixteenth of the Certificate of Incorporation.

<sup>38</sup> Article Seventeenth of the Certificate of Incorporation.

amendment will not become effective until it becomes effective pursuant to this rule filing process.<sup>39</sup>

### III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1, including whether Amendment No. 1 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-2004-56 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-PCX-2004-56. 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

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<sup>39</sup> Article Nineteenth of the Certificate of Incorporation and Section 6.8(b) of the Bylaws of New Arca Holdings.

Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the PCX. 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 Amendment No. 1 of File Number SR-PCX-2004-56 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

#### IV. Discussion and Commission Findings

After careful review, 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>40</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(1) of the Act,<sup>41</sup> which requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules or regulations thereunder, and the rules of the Exchange. The Commission also finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>42</sup> which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade; to facilitate transactions in securities; to remove impediments to and perfect the

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<sup>40</sup> In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>41</sup> 15 U.S.C. 78f(b)(1).

<sup>42</sup> 15 U.S.C. 78f(b)(5).

mechanisms of a free and open market and a national market system; and, in general, to protect investors and the public interest.<sup>43</sup>

A. Self-Regulatory Function of the Exchange

After the conversion of Current Arca Holdings into New Arca Holdings, New Arca Holdings will continue to operate ArcaEx as the equities trading facility of PCX and PCXE, and PCX and PCXE will continue to have regulatory and oversight obligations with respect to ArcaEx.<sup>44</sup> Although ArcaEx and New Arca Holdings do not themselves carry out regulatory functions, as the Commission noted at the time it approved ArcaEx as an equities trading facility of PCX, the operation of ArcaEx would be consistent with the regulatory oversight functions of PCX and PCXE and would not interfere with PCX's self-regulatory responsibilities.<sup>45</sup> Thus, New Arca Holdings' activities with respect to its operation of ArcaEx should be consistent with, and not interfere with, such obligations.

Certain provisions in the Certificate of Incorporation are designed to facilitate the ability of PCX, PCXE and the Commission to fulfill their regulatory obligations with respect to ArcaEx. Specifically, under the Certificate of Incorporation, each director on the Board will be required to take into consideration the effect that New Arca Holdings' actions would have on the ability of PCX and PCXE to carry out their responsibilities under the Act and on the ability of PCX, PCXE and New Arca Holdings to engage in conduct that fosters and does not interfere with PCX's, PCXE's and New Arca Holdings' ability to prevent fraudulent and manipulative acts and

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<sup>43</sup> The Commission has not formally established standards for control persons of shareholder-owned national securities exchanges or facilities thereof. It expects, however, to consider providing guidance on this issue in the future.

<sup>44</sup> In addition, all persons trading through facilities of ArcaEx will continue to be subject to the PCXE rules.

<sup>45</sup> See Securities Exchange Act Release No. 44983 (October 25, 2001); 66 FR 55225 (November 1, 2001), at Section II.A.

practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest.<sup>46</sup> Similarly, each member of the Board, and each officer or employee of New Arca Holdings, and New Arca Holdings itself, shall comply with the federal securities laws and rules and regulations thereunder and cooperate with the Commission, and, for so long as ArcaEx is a facility of PCX and PCXE the Amended and Restated Facility Services Agreement is in effect, with PCX and PCXE pursuant to their regulatory authority.<sup>47</sup>

Moreover, all confidential information pertaining to the self-regulatory function of PCX and PCXE contained in books and records of PCX or PCXE that shall come into the possession of New Arca Holdings shall: (1) not be made available to any persons (other than as provided in the next two sentences) other than to those officers, directors, employees and agents of New Arca Holdings that have a reasonable need to know the contents thereof; (2) be retained in confidence by New Arca Holdings and the officers, directors, employees and agents of New Arca Holdings; and (3) not be used for any commercial purposes, subject to the Commission's right to access and examine such confidential information pursuant to the federal securities laws and rules and regulations thereunder.<sup>48</sup>

The Commission believes that these provisions, which are designed to help maintain the independence of PCX's self-regulatory function and protect from improper use confidential information pertaining to the self-regulatory function of PCX, are appropriate.

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<sup>46</sup> Article Tenth of the Certificate of Incorporation.

<sup>47</sup> Articles Tenth and Sixteenth of the Certificate of Incorporation.

<sup>48</sup> Article Fourteenth of the Certificate of Incorporation.

In addition, the Certificate of Incorporation requires that, for so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, one member of the Board of New Arca Holdings be a member of PCX's board of directors or an officer or employee of PCX nominated by the PCX board of directors. If at any time there is not a director who is a member of PCX's board of directors or an officer or employee of PCX nominated by the PCX board of directors on the Board of New Arca Holdings, the Board shall appoint a director nominated by the PCX board of directors.<sup>49</sup> By providing an opportunity for a representative of PCX to participate in Board meetings of the operator of PCX's trading facility, New Arca Holdings, these provisions are designed to facilitate PCX's, PCXE's and the Commission's ability to effectively perform their regulatory oversight responsibilities with regard to ArcaEx.

B. Changes in Control of New Arca Holdings

The Certificate of Incorporation includes certain provisions, which would impose limitations on direct and indirect changes in control of New Arca Holdings through voting and ownership limitations placed on New Arca Holdings' stock (as outlined below), that are designed to help prevent any stockholder, or any stockholders acting together, from exercising undue control over the operation of New Arca Holdings and, therefore, ArcaEx. The Commission believes that these restrictions, which are designed to help ensure that PCX, PCXE and the Commission are able to carry out their regulatory obligations with respect to ArcaEx, are consistent with the Act.

Specifically, no person, either alone or with its related persons, will be permitted to own beneficially shares of stock of New Arca Holdings representing in the aggregate more than 40%

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<sup>49</sup> Article Eighth of the Certificate of Incorporation.

of the then outstanding votes entitled to be cast on any matter without prior approval from the Board of New Arca Holdings and the Commission to exceed the 40% limitation.<sup>50</sup> In addition, no person, either alone or with its related persons, would be entitled to (1) vote or cause the voting of shares of stock of New Arca Holdings to the extent such shares represent in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter (referred to as the Voting Limitation) or (2) enter into any agreement, plan or arrangement not to vote shares, the effect of which agreement, plan or arrangement would be to enable any person, either alone or with its related persons, to vote or cause the voting of shares that would represent in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter (referred to as the Nonvoting Agreement Prohibition), without prior approval from the Board of New Arca Holdings and the Commission to exceed the 20% limitation.<sup>51</sup> The Certificate of Incorporation also would allow the Board of New Arca Holdings to obtain information about the ownership of its shares of stock in order to determine whether a person, either alone or with its related persons, would exceed these voting and ownership limitations.<sup>52</sup>

The Board will only be able to waive these voting and ownership limitations if it adopts a resolution after making certain findings that doing so would not impair the ability of PCX, PCXE and the Commission to carry out their respective regulatory obligations and is otherwise in the best interests of New Arca Holdings. The Board, however, will not be permitted to approve an

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<sup>50</sup> Section D(1) of Article Fourth of the Certificate of Incorporation. The terms “person” and “related persons” are defined in Section H of Article Fourth of the Certificate of Incorporation, and are described in Section II.B supra.

<sup>51</sup> Section C of Article Fourth of the Certificate of Incorporation.

<sup>52</sup> Section G of Article Fourth of the Certificate of Incorporation. In addition, the information required to be filed by shareholders pursuant to Regulations 13D and 13G will be available to New Arca Holdings for purposes of determining whether any person, along or together with its related persons, has exceeded the voting and ownership limitations.

ETP Holder or person subject to a statutory disqualification to exceed the limits.<sup>53</sup> The resolution would then be filed with the Commission as a proposed rule change under Rule 19b-4 of the Act, and the resolution would not become effective until the proposed rule change becomes effective thereunder.<sup>54</sup> Among other things, these provisions are designed to provide the Commission with the opportunity to determine what, if any, additional measures might be necessary to provide appropriate oversight of the proposed controlling person.

The Certificate of Incorporation also contains provisions designed to provide a disincentive for persons to exceed these limitations without the requisite prior approval.<sup>55</sup> Specifically, if a person, either alone or with its related persons, exceeds the applicable ownership limitations, New Arca Holdings would be required to call from such person and its related persons that number of shares of stock entitled to vote that exceeds the applicable

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<sup>53</sup> Specifically, in approving any such resolution, the Board would be required to determine that: (1) the exercise of such voting rights, the entering into of such agreement, plan or arrangement, or the acquisition of such shares, as applicable, by such person, either alone or with its related persons, would not impair New Arca Holdings', PCX's or PCXE's ability to discharge its responsibilities under the Act and the rules and regulations thereunder and is otherwise in the best interests of New Arca Holdings and its stockholders; (2) the exercise of such voting rights, the entering into of such agreement, plan or arrangement, or the acquisition of such shares would not impair the Commission's ability to enforce the Act; (3) such person and its related persons are not subject to any statutory disqualification (as defined in Section 3(a)(39) of the Act); and (4) such person and its related persons are not ETP Holders. In making such determinations, the Board may impose any conditions and restrictions on such person and its related persons owning any shares of stock of New Arca Holdings entitled to vote on any matter as the board of directors of New Arca Holdings in its sole discretion deems necessary, appropriate or desirable in furtherance of the objectives of the Act and the governance of New Arca Holdings. Sections C and D(1) of Article Fourth of the Certificate of Incorporation.

<sup>54</sup> Sections C and D(1) of Article Fourth of the Certificate of Incorporation.

<sup>55</sup> See Sections C, (D)(1) and (D)(2) of Article Fourth of the Certificate of Incorporation.

limitation at a price equal to the par value of the shares of stock.<sup>56</sup> In addition, if votes were cast in excess of this 20% voting limitation, New Arca Holdings would be required to disregard such votes cast in excess of the 20% voting limitation.<sup>57</sup>

C. Ownership and Voting Restrictions on ETP Holders

The Commission believes that the 20% ownership (and thus voting) restriction on ETP Holders is reasonable and consistent with the Act.<sup>58</sup> It is common for members who trade on an exchange to have ownership interests in the exchange. However, a member's interest could

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<sup>56</sup> Sections D(1) and D(2) of Article Fourth of the Certificate of Incorporation. New Arca Holdings would be required to call the number of shares of stock of New Arca Holdings from such person and its related persons necessary to decrease the beneficial ownership of such person and its related persons to 40%, or to 20% in the case of an ETP Holder, of the outstanding shares of stock entitled to vote on any matter after giving effect to the redemption of the shares.

In addition, Section D(3) of Article Fourth of the Certificate of Incorporation provides that the purported transfer of any shares of stock of New Arca Holdings that would result in a violation of the 40% ownership limitation would not be registered. The Commission understands that, in practical terms, this limitation would apply only in situations where a stockholder is the record owner of shares.

<sup>57</sup> Section C of Article Fourth of the Certificate of Incorporation provides that the 20% voting limitation provisions would not apply to (1) any solicitation of any revocable proxy from any stockholder of New Arca Holdings by or on behalf of New Arca Holdings or by an officer or director of New Arca Holdings acting on behalf of New Arca Holdings or (2) any solicitation of any revocable proxy from any stockholder of New Arca Holdings by any other stockholder that is conducted pursuant to, and in accordance with, Regulation 14A promulgated pursuant to the Act. This provision is designed to ensure that the voting limitations will not restrict the exercise of proxy rights under Regulation 14A of the Act.

<sup>58</sup> Section D(2) of Article Fourth of the Certificate of Incorporation. See Sections II.B and II.C supra for a detailed description of this limitation.

In addition, if an ETP Holder, either alone or with its related persons, owns beneficially shares of stock of New Arca Holdings representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter, New Arca Holdings would be required to call from such ETP Holder and its related persons that number of shares of stock entitled to vote that exceeds this 20% limitation, and would be required not to register the purported transfer of any such shares in violation of this 20% limitation. Sections D(2) and D(3) of Article Fourth of the Certificate of Incorporation.

become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member. A member that is a controlling shareholder of an exchange might be tempted to exercise that controlling influence by directing the exchange to refrain from diligently surveilling the member's conduct or from punishing any conduct that violates the rules of the exchange or the federal securities laws.

Members of Current Arca Holdings who were ETP Holders as of the date of the Certificate of Incorporation will be granted a temporary exemption, not to extend past July 31, 2014, from this 20% ownership limitation to the extent of their beneficial ownership (either alone or with their related persons) of shares of stock of New Arca Holdings after giving effect to the initial public offering of shares of common stock of New Arca Holdings.<sup>59</sup> The Commission believes that a temporary exemption for these ETP Holders is consistent with the Act. The exemption is designed to afford these holders some ability to protect their investment but also to limit the possibility that PCX and PCXE's ability to carry out their self-regulatory responsibilities would be impaired. The Commission understands that only one member of Current Arca Holdings that is an ETP Holder currently owns more than 20% of the shares of Current Arca Holdings, and that the amount of such ETP Holder's ownership interest in New Arca Holdings will fall below the 20% ownership limitation.<sup>60</sup> In addition, this exemption is substantially similar to exemptions granted to founding members of the Boston Options Exchange and the International Securities Exchange.<sup>61</sup>

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<sup>59</sup> Section D(2) of Article Fourth of the Certificate of Incorporation.

<sup>60</sup> See Amendment No. 7 to Registration Statement on Form S-1 at 117-119, and telephone conversation between David Strandberg, Director, Corporate Client Group, Current Arca Holdings; and David Hsu, Attorney, Division, Commission, on August 9, 2004.

<sup>61</sup> See Securities Exchange Act Release Nos. 49067 (January 13, 2004), 69 FR 2761 (January 20, 2004) (approval of SR-BSE-2003-19) (approval of the operating agreement of the Boston Options Exchange); 45803 (April 23, 2002), 67 FR 21306 (April 30, 2002)

D. Regulatory Jurisdiction Over New Arca Holdings

Certain of the terms of the Certificate of Incorporation are designed to help enable the Commission to carry out its oversight responsibilities under the Act. Specifically, the Certificate of Incorporation provides that, for so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, the books, records, premises, officers, directors and employees of New Arca Holdings shall be deemed to be the books, records, premises, officers, directors and employees of PCX and PCXE for purposes of and subject to oversight pursuant to the Act.<sup>62</sup> Furthermore, New Arca Holdings' books and records will be subject at all times to inspection and copying by the Commission and, for so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, by PCX and PCXE, provided that, in the case of PCX and PCXE, such books and records are related to the operation or administration of ArcaEx as a facility of PCX and PCXE. In addition, the Certificate of Incorporation provides that New Arca Holdings (and its officers, directors and employees) would be required to comply with the federal securities laws and rules and regulations thereunder and shall cooperate with the Commission, and, for so

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(approval of SR-ISE-2002-01) (conversion of ISE from an LLC to a corporation); and 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (File No. 10-127) (approval of registration of ISE as a national securities exchange).

<sup>62</sup> Article Fifteenth of the Certificate of Incorporation. Section 19(h)(4) of the Act, 15 U.S.C. 78s(h)(4), authorizes the Commission, by order, to remove from office or censure any officer or director of a national securities exchange if it finds, after notice and an opportunity for hearing, that such officer or director: (1) has willfully violated any provision of the Act or the rules and regulations thereunder, or the rules of a national securities exchange; (2) willfully abused his or her authority; or (3) without reasonable justification or excuse, has failed to enforce compliance with any such provision by a member or person associated with a member of the national securities exchange. Section 17(b)(1) of the Act, 15 U.S.C. 78q(b)(1), subjects the books and records of an SRO to such reasonable periodic, special, or other examination by representatives of the Commission as the Commission deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, with PCX and PCXE pursuant to their regulatory authority.<sup>63</sup>

The Certificate of Incorporation also provides that New Arca Holdings, its directors and officers, and those of its employees whose principal place of business and residence is outside of the United States, shall be deemed to irrevocably submit to the exclusive jurisdiction of the United States federal courts, the Commission, and, for so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, PCX, for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws, and the rules and regulations thereunder, arising out of, or relating to, the activities of ArcaEx, and New Arca Holdings.<sup>64</sup> In addition, New Arca Holdings and each director, officer or and employee waives, and agrees not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission, that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter thereof may not be enforced in or by such courts or agency.<sup>65</sup>

Moreover, the Certificate of Incorporation provides that, from and after the consummation of the initial public offering of shares of common stock of New Arca Holdings, New Arca Holdings would be required take reasonable steps necessary to cause its officers, directors and employees, prior to accepting a position as an officer, director or employee, as applicable, to consent in writing to the applicability to them of the provisions of the Certificate of

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<sup>63</sup> Articles Sixteenth and Eighteenth of the Certificate of Incorporation.

<sup>64</sup> Article Thirteenth of the Certificate of Incorporation.

<sup>65</sup> Id.

Incorporation, with respect to their activities related to ArcaEx and the Commission's jurisdiction over them and the compliance with the federal securities laws.<sup>66</sup>

The Commission also notes that, even in the absence of these provisions of the Certificate of Incorporation, Section 20(a) of the Act<sup>67</sup> provides that any person with a controlling interest in New Arca Holdings would be jointly and severally liable with and to the same extent that New Arca Holdings is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Act<sup>68</sup> creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder, and Section 21C of the Act<sup>69</sup> authorizes the Commission to enter a cease-and-desist order against any person who has been "a cause of" a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.

The Commission believes that, taken together, these provisions are designed to facilitate the ability of the Commission to exercise appropriate oversight of the controlling persons of New Arca Holdings, and are consistent with the Act.

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<sup>66</sup> The Certificate of Incorporation also provides that New Arca Holdings shall take reasonable steps necessary to cause persons holding such positions prior to the consummation of the initial public offering to consent in writing to the applicability to them of such provisions, as applicable, prior to the consummation of the initial public offering. Article Eighteenth of the Certificate of Incorporation.

<sup>67</sup> 15 U.S.C. 78t(a).

<sup>68</sup> 15 U.S.C. 78t(e).

<sup>69</sup> 15 U.S.C. 78u-3.

E. Amendments to the Certificate of Incorporation and Bylaws of New Arca Holdings.

Section 19(b) of the Act<sup>70</sup> and Rule 19b-4 thereunder<sup>71</sup> require a self-regulatory organization (“SRO”) to file proposed rule changes with the Commission. Although New Arca Holdings is not an SRO, certain provisions of its Certificate of Incorporation and Bylaws may be rules of an exchange<sup>72</sup> if they are the stated policies, practices, and interpretations, as defined in Rule 19b-4 of the Act, of the PCX. Any proposed rule or any proposed change in, addition to, or deletion from the rules of an exchange must be filed pursuant to Section 19(b) of the Act and Rule 19b-4 thereunder.<sup>73</sup> Accordingly, PCX has filed the Certificate of Incorporation and the Bylaws of New Arca Holdings with the Commission.

V. Accelerated Approval of Amendment No. 1

Pursuant to Section 19(b)(2) of the Act,<sup>74</sup> the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice of filing thereof, unless the Commission finds good cause for so finding. The

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<sup>70</sup> 15 U.S.C. 78s(b).

<sup>71</sup> 17 CFR 240.19b-4.

<sup>72</sup> Section 3(a)(27) of the Act, 15 U.S.C. 78c(a)(27), defines the rules of an exchange to be the constitution, articles of incorporation, bylaws, and rules, or instruments corresponding to the foregoing, of an exchange, and such stated policies, practices, or interpretations of such exchange as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules of such exchange.

<sup>73</sup> Amendments to the Certificate of Incorporation and Bylaws of New Arca Holdings will be required to be submitted by to the board of directors of PCX and, if the board of directors of PCX determines that such amendment is required, under Section 19 of the Act and the rules promulgated thereunder, to be filed with, or filed with and approved by, the Commission before such amendment may be effective under Section 19 of the Act and the Rule 19b-4 thereunder. Article Nineteenth of the Certificate of Incorporation and Section 6.8(b) of the Bylaws of New Arca Holdings.

<sup>74</sup> 15 U.S.C. 78s(b)(2).

Commission hereby finds good cause for approving Amendment No. 1 to the proposed rule change prior to the thirtieth day after publishing notice of Amendment No. 1 in the Federal Register pursuant to Section 19(b)(2) of the Act.<sup>75</sup> Amendment No. 1 merely clarifies that, whenever the term “beneficial ownership” and any variation thereof is used in Article Fourth of the Certificate of Incorporation, the term has the same meaning as it has in Sections G and H of Article Fourth, and makes other technical corrections to the Certificate of Incorporation. Therefore, the Commission finds that good cause exists to accelerate approval of Amendment No. 1 to the proposed rule change, pursuant to Section 19(b)(2) of the Act.<sup>76</sup>

VI. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder.

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<sup>75</sup>

Id.

<sup>76</sup>

Id.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>77</sup> that the proposed rule change (SR-PCX-2004-56) is approved, and that Amendment No. 1 thereto is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>78</sup>

Margaret H. McFarland  
Deputy Secretary

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Id.

<sup>78</sup>

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