

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-52811; File No. SR-PCX-2005-125)

November 21, 2005

Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Extend Certain Exceptions from the Voting and Ownership Limitations in the Certificate of Incorporation of PCX Holdings, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 15, 2005, the Pacific Exchange, Inc. (“PCX” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by PCX. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

PCX hereby submits to the Commission a proposed rule change to extend certain exceptions from the voting and ownership limitations in the certificate of incorporation of PCX Holdings, Inc. (“PCXH”), a Delaware corporation and the parent company of PCX, approved by the Commission in an order issued on September 22, 2005,<sup>3</sup> so as to allow Archipelago Holdings, Inc. (“Archipelago”), a Delaware corporation and the ultimate parent company of PCXH and PCX, to continue to (i) own and operate the ATS OTC Function (as defined below) of its wholly-owned subsidiary, Archipelago Trading Services, Inc. (“Arca Trading”), and (ii) until the closing of the proposed business combination of Archipelago and the New York Stock Exchange, Inc. (the “NYSE”), a New York not-for-profit corporation (the “Proposed

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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. 52497 (September 22, 2005), 70 FR 56949 (September 29, 2005) (“Order Approving SR-PCX-2005-90”).

Archipelago NYSE Merger”), own and operate the DOT Function (as defined below) of its wholly-owned subsidiary, Archipelago Securities, L.L.C. (“Archipelago Securities”).

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

In its filing with the Commission, 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 III 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

a. PCXH Acquisition and the Amendment of the PCXH Certificate of Incorporation

On September 26, 2005, Archipelago completed its acquisition of PCXH and all of its wholly-owned subsidiaries, including PCX and PCX Equities, Inc. (“PCXE”) (the “PCXH Acquisition”). The PCXH Acquisition was accomplished by way of a merger of PCXH with a wholly-owned subsidiary of Archipelago, with PCXH being the surviving corporation in the merger and becoming a wholly-owned subsidiary of Archipelago.

The certificate of incorporation of PCXH (as amended to date, the “PCXH Certificate of Incorporation”) contains various ownership and voting restrictions on PCXH’s capital stock, which are designed to safeguard the independence of the self-regulatory functions of PCX and to protect the Commission’s oversight responsibilities. In order to allow Archipelago to own 100% of the capital stock of PCXH, prior to the completion of the PCXH Acquisition, PCX filed with the Commission a proposed rule change which sought to, among other things, amend the PCXH

Certificate of Incorporation to create an exception from the voting and ownership restrictions for Archipelago and certain of its related persons (the “Original Rule Filing”).<sup>4</sup> The Original Rule Filing, as amended by Amendment No. 1 and Amendment No. 2 thereto, was approved by the Commission on September 22, 2005<sup>5</sup> and the amended PCXH Certificate of Incorporation became effective on September 26, 2005, upon the closing of the PCXH Acquisition.

Article Nine of the PCXH Certificate of Incorporation provides that no Person<sup>6</sup>, either alone or together with its Related Persons<sup>7</sup>, may own, directly or indirectly, shares constituting more than 40% of the outstanding shares of any class of PCXH capital stock,<sup>8</sup> and that no

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<sup>4</sup> See Pacific Exchange, Inc., Proposed Rule Change Relating to the Certificate of Incorporation of PCX Holdings, Inc., PCX Rules, and Bylaws of Archipelago Holdings, Inc., File No. SR-PCX-2005-90 (August 1, 2005).

<sup>5</sup> See Order Approving SR-PCX-2005-90.

<sup>6</sup> “Person” is defined to mean an individual, partnership (general or limited), joint stock company, corporation, limited liability company, trust or unincorporated organization, or any governmental entity or agency or political subdivision thereof. PCXH Certificate of Incorporation, Article Nine, Section 1(b)(iv).

<sup>7</sup> The term “Related Person,” as defined in the PCXH Certificate of Incorporation, means (i) with respect to any person, all “affiliates” and “associates” of such person (as such terms are defined in Rule 12b-2 under the Act; (ii) with respect to any person constituting a trading permit holder of PCX or an equities trading permit holder of PCXE, any broker dealer with which such holder is associated; and (iii) any two or more persons that have 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 capital stock of PCXH. PCXH Certificate of Incorporation, Article Nine, Section 1(b)(iv).

<sup>8</sup> PCXH Certificate of Incorporation, Article Nine, Section 1(b)(i). However, such restriction may be waived by the Board of Directors of PCXH pursuant to an amendment to the Bylaws of PCXH adopted by the Board of Directors, if, in connection with the adoption of such amendment, the Board of Directors adopts a resolution stating that it is the determination of such Board that such amendment will not impair the ability of PCX to carry out its functions and responsibilities as an “exchange” under the Act and is otherwise in the best interests of PCXH and its stockholders and PCX, and will not impair the ability of the Commission to enforce said Act, and such amendment shall not be effective until approved by said Commission; provided that the Board of Directors of PCXH shall have determined that such Person and its Related Persons are not subject to any applicable “statutory disqualification” (within the meaning of Section 3(a)(39) of the

Person, either alone or together with its Related Persons who is a trading permit holder of PCX or an equities trading permit holder of PCXE, may own, directly or indirectly, shares constituting more than 20% of any class of PCXH capital stock.<sup>9</sup> Furthermore, the PCXH Certificate of Incorporation provides that, for so long as PCXH controls, directly or indirectly, PCX, no Person, either alone or with its Related Persons, may directly or indirectly vote or cause the voting of shares of PCXH capital stock or give any proxy or consent with respect to shares representing more than 20% of the voting power of the issued and outstanding PCXH capital stock.<sup>10</sup> The PCXH Certificate of Incorporation also places limitations on the right of any Person, either alone or with its Related Persons, to enter into any agreement with respect to the withholding of any vote or proxy.<sup>11</sup>

PCX proposed (and the Commission approved) an exception from the ownership and voting limitations described above by adding a new paragraph at the end of Article Nine of the PCXH Certificate of Incorporation, which provides that for so long as Archipelago directly owns all of the outstanding capital stock of PCXH, these ownership and voting limitations shall not be applicable to the ownership and voting of shares of PCXH by (i) Archipelago, (ii) any Person that is a Related Person of Archipelago, either alone or together with its Related Persons, and (iii) any other Person to which Archipelago is a Related Person, either alone or together with its Related Persons.<sup>12</sup> These exceptions to the ownership and voting limitations, however, shall not

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Act). PCXH Certificate of Incorporation, Article Nine, Sections 1(b)(i)(B) and 1(b)(i)(C).

<sup>9</sup> PCXH Certificate of Incorporation, Article Nine, Section 1(b)(ii).

<sup>10</sup> PCXH Certificate of Incorporation, Article Nine, Section 1(c).

<sup>11</sup> Id.

<sup>12</sup> PCXH Certificate of Incorporation, Article Nine, Section 4.

apply to any “Prohibited Persons,”<sup>13</sup> which is defined to mean any Person that is, or that has a Related Person that is (i) an OTP Holder or an OTP Firm (as defined in the rules of PCX)<sup>14</sup> or (ii) an ETP Holder (as defined in the rules of PCXE),<sup>15</sup> unless such Person is also a “Permitted Person” under the PCXH Certificate of Incorporation.<sup>16</sup> The PCXH Certificate of Incorporation further provides that any Prohibited Person not covered by the definition of a Permitted Person who is subject to and exceeds the voting and ownership limitations imposed by Article Nine as of the date of the closing of the PCXH Acquisition shall be permitted to exceed the voting and ownership limitations imposed by Article Nine only to the extent and for the time period approved by the Commission.<sup>17</sup>

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<sup>13</sup> Id.

<sup>14</sup> PCX rules define an “OTP Holder” to mean any natural person, in good standing, who has been issued an Options Trading Permit (“OTP”) by the Exchange for effecting approved securities transactions on the Exchange’s trading facilities, or has been named as a Nominee. PCX Rule 1.1(q). The term “Nominee” means an individual who is authorized by an “OTP Firm” (a sole proprietorship, partnership, corporation, limited liability company or other organization in good standing who holds an OTP or upon whom an individual OTP Holder has conferred trading privileges on the Exchange’s trading facilities) to conduct business on the Exchange’s trading facilities and to represent such OTP Firm in all matters relating to the Exchange. PCX Rule 1.1(n).

<sup>15</sup> PCXE rules define an “ETP Holder” to mean any sole proprietorship, partnership, corporation, limited liability company or other organization in good standing that has been issued an Equity Trading Permit, a permit issued by the PCXE for effecting approved securities transactions on the trading facilities of PCXE. PCXE Rule 1.1(n).

<sup>16</sup> “Permitted Person” is defined to mean (A) any broker or dealer approved by the Commission after June 20, 2005 to be a facility (as defined in Section 3(a)(2) of the Act) of PCX; (B) any Person that has been approved by the Commission prior to it becoming subject to the provisions of Article Nine of the PCXH Certificate of Incorporation with respect to the voting and ownership of shares of PCXH capital stock by such Person; and (C) any Person that is a Related Person of Archipelago solely by reason of beneficially owning, either alone or together with its Related Persons, less than 20% of the outstanding shares of Archipelago capital stock. PCXH Certificate of Incorporation, Article Nine, Section 4.

<sup>17</sup> Id.

b. ATS OTC Function

Arca Trading is a broker-dealer and an ETP Holder of PCXE. The business of Arca Trading includes, among other things, the operation of an alternative trading system (“ATS”) (as defined in Regulation ATS promulgated by the Commission under the Act)<sup>18</sup> for trading of over-the-counter bulletin board securities that are not traded on any securities exchange or Nasdaq (including, for the avoidance of doubt, The NASDAQ National Market and The NASDAQ SmallCap Market) (such function was referred to as the “ATS OTC Function” in the Order Approving SR-PCX-2005-90). Because Arca Trading is a broker-dealer and an ETP Holder, and a wholly-owned subsidiary and, consequently, a Related Person, of Archipelago, it falls within the definition of “Prohibited Persons.” Absent an exception, Archipelago’s ownership of PCXH would cause Arca Trading to exceed the voting and ownership limitations imposed by Article Nine of the PCXH Certificate of Incorporation. Therefore, in connection with the PCXH Acquisition, PCX requested an exception on a pilot basis for Arca Trading from the ownership and voting limitations in the PCX Certificate of Incorporation for Archipelago’s ownership and operation of the ATS OTC Function of Arca Trading.<sup>19</sup> The Commission approved PCX’s proposal and allowed Archipelago to continue to own and operate the ATS OTC Function of Arca Trading for a period of 60 days following the closing of the PCXH Acquisition.<sup>20</sup> The pilot approval was designed to provide the public and other interested parties the opportunity to comment on the exception before the exception being made permanent. In the Order Approving SR-PCX-2005-90, the Commission specifically noted that in its adoption of Regulation ATS, it

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<sup>18</sup> 17 CFR 242.300 through 17 CFR 242.303.

<sup>19</sup> See Amendment No. 2 to the Original Rule Filing (File Number SR-PCX-2005-90), at 6 (September 16, 2005) (“Amendment No.2”).

<sup>20</sup> See Order Approving SR-PCX-2005-90, at 56960.

had stated that exchanges could form subsidiaries that operate ATSS registered as broker-dealers and that such subsidiaries would of course be required to become members of a national securities association or another national securities exchange.<sup>21</sup>

c. DOT Function of Archipelago Securities

Archipelago Securities is a registered broker-dealer, a member of the National Association of Securities Dealers, Inc. and an ETP Holder of PCXE. Among other things, Archipelago Securities engages in the business of providing broker-dealer clients with direct connectivity, through the NYSE Designated Order Turnaround System, to the NYSE (such function was referred to as the “DOT Function” in the Order Approving SR-PCX-2005-90). Because Archipelago Securities is a broker-dealer and an ETP Holder, and a wholly-owned subsidiary and, consequently, a Related Person, of Archipelago, it falls within the definition of “Prohibited Persons.” Absent an exception, Archipelago’s ownership of PCXH would cause Archipelago Securities to exceed the voting and ownership limitations imposed by Article Nine of the PCXH Certificate of Incorporation. Therefore, in connection with the PCXH Acquisition, PCX requested an exception on a pilot basis for Archipelago Securities from the ownership and voting limitations for Archipelago’s ownership and operation of the DOT Function of Archipelago Securities, on the condition that in no event would Archipelago or PCX request that this exception be extended beyond the completion of the Proposed Archipelago NYSE Merger.<sup>22</sup> In the Order Approving SR-PCX-2005-90, the Commission approved PCX’s request for Archipelago to continue to own and operate the DOT Function of Archipelago Securities until

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<sup>21</sup> Id. at 56959. The Commission also noted in the Order Approving SR-PCX-2005-90 that in adopting Regulation ATS, the Commission stated that any subsidiary or affiliate ATS could not integrate, or otherwise link the ATS with the exchange, including using the premises or property of such exchange for effecting or reporting a transaction, without being considered a facility of the exchange. Id.

<sup>22</sup> See Amendment No. 2, at 7.

the earlier of a period of 60 days following the closing of the PCXH Acquisition and the closing of the Proposed Archipelago NYSE Merger.<sup>23</sup>

d. Requests for Approval

Because the PCXH Acquisition was consummated on September 26, 2005, the temporary approvals with respect to the ATS OTC Function of Arca Trading and the DOT Function of Archipelago Securities will expire on November 25, 2005. The Exchange hereby submits to the Commission the following requests:

(i) The Exchange hereby requests that the Commission approve Archipelago's ownership and operation of the ATS OTC function of Arca Trading on a permanent basis. Without the Commission's approval sought hereby, upon the expiration of the 60 day pilot approval, Archipelago's ownership of PCXH would cause Arca Trading to exceed the voting and ownership limitations imposed by Article Nine of the PCXH Certificate of Incorporation because ATS, a broker-dealer and an ETP Holder of PCXE, is a wholly owned subsidiary and, consequently, a Related Person, of Archipelago.

(ii) The Exchange hereby requests that the Commission approve an extension of the pilot approval with respect to Archipelago's ownership and operation of the DOT Function of Archipelago Securities until the closing of the Proposed Archipelago NYSE Merger. Without the Commission's approval sought hereby, upon the expiration of the 60 day pilot approval, Archipelago's ownership of PCXH would cause Archipelago Securities to exceed the voting and ownership limitations imposed by Article Nine of the PCXH Certificate of Incorporation because Archipelago Securities, a broker-dealer and an ETP Holder of PCXE, is a wholly owned subsidiary and, consequently, a Related Person, of Archipelago and the approval of the other

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<sup>23</sup> See Order Approving SR-PCX-2005-90, at 56960.



functions of Archipelago Securities granted by the Commission previously were limited in scope and did not include its DOT Function.

## 2. Basis

The Exchange believes that the proposed rule change in this filing is consistent with Section 6(b) of the Act,<sup>24</sup> in general, and furthers the objectives of Section 6(b)(1),<sup>25</sup> in particular, in that it enables the Exchange to be so organized so as to have the capacity to be able to carry out the purposes of the Act and to comply, and (subject to any rule or order of the Commission pursuant to Section 17(d) or 19(g)(2) of the Act) to enforce compliance by its exchange members and Persons associated with its exchange members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange also believes that this filing furthers the objectives of Section 6(b)(5),<sup>26</sup> in particular, because the rules summarized herein would create a governance and regulatory structure with respect to the operation of the business of PCX<sup>27</sup> that is designed to help prevent fraudulent and manipulative acts and practices; to promote just and equitable principals of trade; to foster cooperation and coordination with Persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; and to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

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<sup>24</sup> 15 U.S.C. 78f(b).

<sup>25</sup> 15 U.S.C. 78f(b)(1).

<sup>26</sup> 15 U.S.C. 78f(b)(5).

<sup>27</sup> PCX clarified that the governance and regulatory structure created by the proposal relates to the operation of PCX's business generally, not only to its options business. Telephone conversation between Janet Angstadt, Deputy General Counsel and Assistant Corporate Secretary, PCX and Jennifer Dodd, Special Counsel, Division of Market Regulation, Commission, on November 21, 2005.

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.

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. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-PCX-2005-125 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-PCX-2005-125. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those

that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of 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 File Number SR-PCX-2005-125 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Discussion of Commission Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>28</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(1) of the Act,<sup>29</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>30</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 mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest.

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<sup>28</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>29</sup> 15 U.S.C. 78f(b)(1).

<sup>30</sup> 15 U.S.C. 78f(b)(5).

Pursuant to Section 19(b)(2) of the Act,<sup>31</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 thereof, unless the Commission find good cause for so doing. The Commission hereby finds good cause for approving the proposed rule change prior to the thirtieth day after publishing notice thereof in the Federal Register pursuant to Section 19(b)(2) of the Act.<sup>32</sup> The Commission believes that the requested extensions are consistent with the terms and conditions set forth in the Order Approving SR-PCX-2005-90, and notes that in its filing, PCX represented that accelerated effectiveness of the proposed rule change before the expiration of the pilot approvals would provide continuity of Archipelago's operation of the ATS OTC Function and DOT Function. The Commission also notes that the proposed changes are extensions of exceptions that the Commission approved on a pilot basis in the Order Approving SR-PCX-2005-90 and, as such, do not raise any new or novel issues. The pilots are both currently set to expire on November 25, 2005. Permitting PCX to extend the pilots will permit Archipelago to avoid disruption of its operation of the ATS OTC Function and the DOT Function. Furthermore, the Commission notes that after the publication of the pilot approvals in the Federal Register, the Commission did not receive any comment with respect to Archipelago's ownership and operation of the ATS OTC Function of Arca Trading and the DOT Function of Archipelago Securities.

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

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<sup>31</sup> 15 U.S.C. 78s(b)(2).

<sup>32</sup> Id.

good cause exists to accelerate approval of the proposed rule change, pursuant to Section 19(b)(2) of the Act.<sup>33</sup>

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>34</sup> that the proposed rule change (SR-PCX-2005-125) is approved on an accelerated basis. Specifically, a permanent exception for the ATS OTC Function of Arca Trading is approved; and the exception for the DOT Function of Archipelago Securities is approved on a pilot basis until the closing date of the Proposed Archipelago NYSE Merger.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>35</sup>

Jonathan G. Katz  
Secretary

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<sup>33</sup> Id.  
<sup>34</sup> Id.  
<sup>35</sup> 17 CFR 200.30-3(a)(12).