

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-54078; File No. SR-PCX-2005-54)

June 30, 2006

Self-Regulatory Organizations; NYSE Arca, Inc., Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Requiring OTP Holders and OTP Firms to Participate in the Federal Trade Commission's National Do-Not-Call Registry

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 18, 2006, NYSE Arca, Inc. ("NYSE Arca" or "Exchange")<sup>3</sup> filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. On May 26, 2006, NYSE Arca filed Amendment No. 1 to the proposed rule change.<sup>4</sup> On June 21, 2006, NYSE Arca filed Amendment No. 2 to the proposed rule change.<sup>5</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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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> On March 6, 2006, the Pacific Exchange, Inc. filed a rule proposal, effective upon filing, to amend its rules to reflect these name changes: from Pacific Exchange, Inc. to NYSE Arca, Inc.; from PCX Equities, Inc. to NYSE Arca Equities, Inc.; from PCX Holdings, Inc., to NYSE Arca Holdings, Inc.; and from the Archipelago Exchange, L.L.C. to NYSE Arca, L.L.C. See File No. SR-PCX-2006-24 (March 6, 2006). This proposal has been amended to reflect these name changes.

<sup>4</sup> In Amendment No. 1, NYSE Arca partially amended the text of proposed amended NYSE Arca Rule 9.20 and made conforming and technical changes to the original filing.

<sup>5</sup> In Amendment No. 2, NYSE Arca made additional changes to the text of proposed amended NYSE Arca Rule 9.20 and to the original filing.

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

NYSE Arca proposes to amend NYSE Arca Rule 9.20. The proposed rule change would require OTP Holders and OTP Firms to participate in the Federal Trade Commission's ("FTC") national do-not-call registry. The current text of Arca Rule 9.20(b) would be deleted. The text of the proposed rule change is set forth below.

Underlining indicates new text.

**Rules of the NYSE Arca, Inc.**

**RULE 9 CONDUCTING BUSINESS WITH THE PUBLIC**

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**Telemarketing**

9.20(b) (1) General Telemarketing Requirements. No OTP Firm, OTP Holder or associated person shall make any telephone solicitation, as defined in Section 9.20(b)(10)(B) to:

(A) Any residence of a person before the hour of 8 a.m. or after 9 p.m.

(local time at the called party's location), unless:

(i) the OTP Firm or OTP Holder has an established business relationship with the person pursuant to Section 9.20(b)(10)(A);

(ii) the OTP Firm or OTP Holder has received that person's prior express invitation or permission; or

(iii) the person called is a broker or dealer.

(B) Any person that previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the OTP Firm or OTP Holder; or

(C) Any person who has registered his or her telephone number on the Federal Trade Commission's national do-not-call registry.

(2) National Do-Not-Call Registry Exceptions. An OTP Firm or OTP Holder will not be liable for violating Section 9.20(b)(1)(C) if:

(A) The OTP Firm or OTP Holder has an established business relationship with the recipient of the call. A person's request to be placed on an OTP Firm's or OTP Holder's firm-specific do-not-call list terminates the established business relationship exception to that national do-not-call registry provision for that OTP Firm or OTP Holder even if the person continues to do business with the OTP Firm or OTP Holder;

(B) The OTP Firm or OTP Holder has obtained the person's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the person and the OTP Firm or OTP Holder that states that the person agrees to be contacted by the OTP Firm or OTP Holder and includes the telephone number to which the calls may be placed; or

(C) The associated person making the call has a personal relationship with the recipient of the call.

(3) Safe Harbor Provision. The OTP Firm, OTP Holder or associated person making telephone solicitations will not be liable for violating Section 9.20(b)(1)(C) if the OTP Firm, OTP Holder or associated person demonstrates that the violation is the result of an error and that as part of the OTP Firm's or OTP Holder's routine business practice it meets the following standards:

(A) The OTP Firm or OTP Holder has established and implemented written procedures to comply with the national do-not-call rules;

(B) The OTP Firm or OTP Holder has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(C) The OTP Firm or OTP Holder has maintained and recorded a list of telephone numbers that it may not contact; and

(D) The OTP Firm or OTP Holder uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process.

(4) Procedures. Prior to engaging in telemarketing, an OTP Firm or OTP Holder must institute procedures to comply with Section 9.20(b)(1). Such procedures must meet the minimum standards:

(A) Written policy. The OTP Firm or OTP Holder must have a written policy available upon demand for maintaining a do-not-call list.

(B) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list, including the policies and procedures of the firm regarding communication with the public.

(C) Recording, honoring do-not-call requests. If an OTP Firm or OTP Holder receives a request from a person not to receive calls from that OTP Firm or

OTP Holder, the OTP Firm or OTP Holder must record the request and place the person's name, if provided, and telephone number on the firm's do-not-call list at the time the request is made. The OTP Firm or OTP Holder must honor a person's do-not-call request within a reasonable time from the date such request is made. This period may not exceed 30 days from the date of such request. If such requests are being recorded or maintained by a party other than the OTP Firm or OTP Holder on whose behalf the telemarketing call is made, the OTP Firm or OTP Holder on whose behalf the telemarketing call is made will be liable for any failure to honor the do-not-call request.

(D) Identification of sellers and telemarketers. An OTP Firm or OTP Holder or person associated with an OTP Firm or OTP Holder making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the OTP Firm or OTP Holder, an address or telephone number at which the OTP Firm or OTP Holder may be contacted, and that the purpose of the call is to solicit the purchase or sale of securities or a related service. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(E) Affiliated persons or entities. In the absence of a specific request by the person to the contrary, a person's do-not-call request shall apply to the OTP Firm or OTP Holder making the call, and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product or service being advertised.

(F) Maintenance of do-not-call lists. An OTP Firm or OTP Holder making calls for telemarketing purposes must maintain a record of the caller's request not to receive further telemarketing calls. A firm-specific do-not-call request must be honored for five years from the time the request is made.

(5) Wireless Communications.

(A) OTP Firms and OTP Holders are prohibited from using an automatic telephone dialing system or an artificial or prerecorded voice when initiating a telephone call to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

(B) The provisions set forth in this rule are applicable to OTP Firms and OTP Holders telemarketing or making telephone solicitations calls to wireless telephone numbers.

(6) Outsourcing Telemarketing. If an OTP Firm or OTP Holder uses another entity to perform telemarketing services on its behalf, the OTP Firm or OTP Holder remains responsible for ensuring compliance with all provisions contained in this rule.

(7) Pre-Recorded Messages.

(A) An OTP Firm or OTP Holder may not initiate any telephone call to any residence using an artificial or prerecorded voice to deliver a message, without the prior express consent of the person called, unless the call:

(i) is not made for a commercial purpose;

(ii) is made for a commercial purpose, but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation; or

(iii) is made to any person with whom the OTP Firm or OTP Holder has an established business relationship at the time the call is made.

(B) All artificial or prerecorded telephone messages shall:

(i) At the beginning of the message, state clearly the identity of the OTP Firm or OTP Holder that is responsible for initiating the call. The OTP Firm or OTP Holder responsible for initiating the call must state the name under which the OTP Firm or OTP Holder is registered to conduct business with the applicable State Corporation Commission (or comparable regulatory authority); and

(ii) During or after the message, the OTP Firm or OTP Holder must state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such OTP Firm or OTP Holder. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(iii) For telemarketing messages to a residence, such telephone number, mentioned in Section 9.20(b)(7)(B)(ii) above, must permit any person to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.

(8) Telephone Facsimile or Computer Advertisements

No OTP Firm, OTP Holder or associated person may use a telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine, computer or other device.

(A) For purposes of Section 9.20(b)(8) of this rule, a facsimile advertisement is not “unsolicited” if the recipient has granted the OTP Firm, OTP Holder or associated person prior express invitation or permission to deliver the advertisement. Such express invitation or permission must be evidenced by a signed, written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient’s consent to receive such facsimile advertisements from the OTP Firm, OTP Holder or associated person.

(B) OTP Firms, OTP Holders and associated persons must clearly mark, in a margin at the top or bottom of each page of the transmission, the date and time it is sent and an identification of the OTP Firm, OTP Holder or associated person sending the message and the telephone number of the sending machine or of the OTP Firm, OTP Holder or associated person sending the transmission.

(9) Caller Identification Information

(A) Any OTP Firm or OTP Holder that engages in telemarketing, as defined in Section 9.20(b)(10)(B) of this rule, must transmit caller identification information. Such caller identification information must include either the Calling Party Number (“CPN”) or the calling party’s billing number, also known as the Charge Number (“ANI”), and, when available from the telephone carrier, the name of the OTP Firm or OTP Holder. The telephone number so provided must permit any



person to make a do-not-call request during regular business hours. Whenever possible, CPN is the preferred number and should be transmitted.

(B) Any OTP Firm or OTP Holder that engages in telemarketing, as defined in Section 9.20(b)(10)(B) of this rule, is prohibited from blocking the transmission of caller identification information.

(C) Provision of caller identification information does not obviate the requirement for a caller to verbally supply identification information during a call.

(10) Definitions.

(A) For purposes of Section 9.20, an OTP Firm or OTP Holder has an “established business relationship” with a person if:

(i) the person has made a financial transaction or has a security position, a money balance, or account activity with the OTP Firm or OTP Holder or at a clearing firm that provides clearing services to such OTP Firm or OTP Holder within the previous 18 months immediately preceding the date of the telemarketing call;

(ii) the OTP Firm or OTP Holder is the broker-dealer of record for an account of the person within the previous 18 months immediately preceding the date of the telemarketing call; or

(iii) the person has contacted the OTP Firm or OTP Holder to inquire about a product service offered by the OTP Firm or OTP Holder within the previous three months immediately preceding the date of the telemarketing call, which relationship has not been previously terminated by either party.

A person's established business relationship with an OTP Firm or OTP Holder does not extend to the OTP Firm's or OTP Holder's affiliated entities unless the person would reasonably expect them to be included, given the nature and type of products or services offered by the affiliate and the identity of the affiliate.

Similarly, a person's established business relationship with an OTP Firm's or Holder's affiliate does not extend to the OTP Firm or OTP Holder unless the person would reasonably expect the OTP Firm or OTP Holder to be included.

A person's request to be placed on an OTP Firm's or OTP Holder's firm-specific do-not-call list as set forth in Section 9.20(b)(1)(B) of this rule terminates an established business relationship for purposes of telemarketing and telephone solicitation, even if the person continues to do business with the OTP Holder or OTP Firm.

(B) The terms "telemarketing" and "telephone solicitation" mean the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(C) The term "personal relationship" means any family member, friend or acquaintance of the telemarketer making the call.

(D) The term "account activity" shall include, but not be limited to, purchases, sales, interest credits or debits, charges or credits, dividend payments, transfer activity, securities receipts or deliveries, and/or journal entries relating to securities or funds in the possession or control of the OTP Firm or OTP Holder.

(E) The term “broker-dealer of record” refers to the broker-dealer identified on a customer’s account application for accounts held directly at a mutual fund or variable insurance product issuer.

(F) The terms “automatic telephone dialing system” and “autodialer” mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(G) The term “telephone facsimile machine” means equipment which has the capacity to transcribe text or images (or both) from paper, into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(H) The term “unsolicited advertisement” means any material advertising the commercial availability or quality of any products or services which is transmitted to any person without that person’s prior express invitation or permission.

Rule 9.20(c)-(d) – No Change.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections (A), (B) and (C) below, of the most significant aspects of such statements.

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

1. Purpose

The purpose of this Amendment No. 2 is to make the proposed rule consistent with NYSE Rule 404A by including provisions concerning general telemarketing requirements, procedures, wireless communications, outsourcing telemarketing, pre-recorded messages, telephone facsimile or computer advertisements and caller identification. This Amendment No. 2 replaces the original filing in its entirety. In 2003, the FTC, via its Telemarketing Sales Rule, and the Federal Communications Commission (“FCC”), via its Miscellaneous Rules Relating to Common Carriers, established requirements for sellers and telemarketers to participate in a national do-not-call registry.<sup>6</sup> Since June 2003, consumers have been able to enter their home telephone numbers into the national do-not-call registry, which is maintained by the FTC. Under rules of the FTC and FCC, sellers and telemarketers generally are prohibited from making telephone solicitations to consumers whose numbers are listed in the national do-not-call registry. The FCC’s do-not-call rules apply to broker-dealers while the FTC’s rules do not.<sup>7</sup>

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<sup>6</sup> The do-not-call rules of the FCC and FTC are very similar in terms of substance, in part, because Congress directed the FCC to consult with the FTC to maximize consistency between their respective do-not-call rules. See The Do-Not-Call Implementation Act, 108 P.L. 10, 117 Stat. 557 (March 11, 2003).

<sup>7</sup> See 15 U.S.C. § 6102(d)(2)(A), which provides that “The Rules promulgated by the Federal Trade Commission under subsection (a) shall not apply to . . . [among other persons, brokers or dealers] . . .” The FTC’s rules were not promulgated under 15 U.S.C. § 6102. The FCC’s rules are not subject to this limitation and apply to all sellers and telemarketers.

In February 2005, the SEC requested that NYSE Arca adopt the proposed telemarketing rules to require OTP Holders and OTP Firms to participate in the do-not-call registry.<sup>8</sup> Because broker-dealers are subject to the FCC's do-not-call rules, NYSE Arca modeled its rules in this area after those of the FCC and codified these do-not-call requirements in NYSE Arca Rule 9.20(b), with minor modifications tailoring the rules to broker-dealer activities and the securities industry. Current NYSE Arca Rule 9.20(b) will be deleted and replaced in its entirety with proposed Rule 9.20(b) set forth in Exhibit 5.

### **Safe Harbor Provision for the National Do-Not-Call Registry Requirements**

The FCC and FTC each provided persons subject to their respective do-not-call rules a "safe harbor" providing that a seller or telemarketer is not liable for a violation of the do-not-call rules that is the result of an error if the seller or telemarketer's routine business practice meets certain standards. The Exchange has provided a parallel safe harbor in paragraph (3) of proposed NYSE Arca Rule 9.20(b); the safe harbor is limited the requirements of paragraph (1)(C) of proposed NYSE Arca Rule 9.20(b), which prohibits an OTP Firm, OTP Holder or associated person from initiating any telephone solicitation to any person who has registered his or her phone number with the national do-not-call registry.

To be eligible for this proposed NYSE Arca Rule 9.20(b) safe harbor, an OTP Holder or OTP Firm must demonstrate that the OTP Holder's or OTP Firm's routine business practice meets four standards in proposed Rule 9.20(b). First, the OTP Holder

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<sup>8</sup> The Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 (codified at 15 U.S.C. § 6102) requires the SEC to promulgate telemarketing rules substantially similar to those of the FTC or to direct self-regulatory organizations to promulgate such rules unless the SEC determines that such rules are not in the interest of investor protection.

or OTP Firm must have established and implemented written procedures to comply with the national do-not-call rules. Second, the OTP Holder or OTP Firm must have trained its personnel, and any entity assisting it in its compliance, in procedures established pursuant to the national do-not-call rules. Third, the OTP Holder or OTP Firm must have maintained and recorded a list of telephone numbers that the OTP Holder or OTP Firm may not contact. Fourth, the OTP Holder or OTP Firm must use a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the FTC no more than thirty-one (31) days prior to the date any call is made, and must maintain records documenting this process.

### **Other Provisions**

This Amendment No. 2 includes additional provisions concerning general telemarketing requirements, procedures, wireless communications, outsourcing telemarketing, pre-recorded messages, telephone facsimile or computer advertisements and caller identification. Proposed Section 9.20(b)(1) outlines the General Telemarketing Requirements specifying when OTP Holders, OTP Firms and associated persons may not contact residences and certain persons. Proposed Section 9.20(b)(2) provides an exception for calling a person on the national do-not-call registry if the OTP Holder or OTP Firm has the person's permission to make calls, or if the OTP Holder or OTP Firm has an established business relationship with the person. Proposed Section 9.20(b)(4) sets forth the procedures that OTP Firms or OTP Holders must institute to comply with the General Telemarketing Requirements set forth in Section 9.20(b)(1). Proposed Section 9.20(b)(5) sets forth when OTP Firms and OTP Holders are prohibited from

using wireless communications. Proposed Section 9.20(b)(6) sets forth the requirement that OTP Firms and OTP Holders outsourcing telemarketing remain responsible for compliance with Section 9.20(b). Proposed Section 9.20(b)(7) sets forth the requirements that OTP Firms and OTP Holders must satisfy to utilize pre-recorded messages. Proposed Section 9.20(b)(8) prohibits OTP Firms, OTP Holders or associated person from using a telephone facsimile machine, computer or other device to send unsolicited advertisements to a telephone facsimile machine, computer or other device. Finally, proposed Section 9.20(b)(9) sets forth the requirement that OTP Firms and OTP Holders engaging in telemarketing must transmit caller identification information.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act<sup>9</sup> in general, and furthers the objectives of Section 6(b)(5)<sup>10</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change will increase the protection of investors by enabling investors who do not want to receive telephone solicitations from OTP Firms or OTP Holders to receive the benefits and protections of the national do-not-call registry.

### 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 Exchange Act.

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<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

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 by the Exchange.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve such rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Exchange 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov).
- Please include File Number SR-PCX-2005-54 on the subject line.

Paper comments:



- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, N.E., Washington, DC 20549-1090. All submissions should refer to File Number SR-PCX-2005-54. 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, Station Place, 100 F Street, N.E., Washington, DC 20549-1090. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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-2005-54 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

Nancy M. Morris  
Secretary

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<sup>11</sup> 17 CFR 200.30-3(a)(12).