

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-49946; File No. SR-PCX-2004-56)

June 30, 2004

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Exchange, Inc. to Relating to the Certificate of Incorporation and Bylaws of Archipelago 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 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” or “SEC”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange, through PCXE, is filing with the Commission certain organizational documents of Archipelago Holdings, Inc. (“New Arca Holdings”), an entity that will succeed Archipelago Holdings, L.L.C. (“Current Arca Holdings”) as the sole parent of the current equities trading facility of PCX and PCXE, the Archipelago Exchange, L.L.C. (“ArcaEx”). New Arca Holdings’ proposed Certificate of Incorporation and Bylaws are collectively referred to herein as the “proposed rule change” and are available for viewing on the Commission’s Web site, [www.sec.gov/rules/sro.shtml](http://www.sec.gov/rules/sro.shtml), and at PCX and the Commission.

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

<sup>2</sup> 17 CFR 240.19b-4.

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. 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 Exchange is filing with the Commission the proposed organizational documents of New Arca Holdings, the entity that is proposed to succeed Current Arca Holdings as the parent company of ArcaEx, the operator of the equities trading facility of PCX and PCXE. Current Arca Holdings is proposing to convert into a Delaware corporation (New Arca Holdings) and effect an initial public offering of the common stock of New Arca Holdings, and expects to use the proceeds of the offering for general corporate purposes, including to provide additional funds for its operations and to expand and diversify its product and service offerings, and possibly to acquire new businesses, products and technologies.

In connection with the conversion to a Delaware corporation, each of the current members of Current Arca Holdings will receive 0.222222 shares of common stock of New Arca Holdings for each of their current shares in Current Arca Holdings, and one of Current Arca Holdings' members, GAP Arca Holdings, Inc., will be merged with and into New Arca Holdings.<sup>3</sup> The stockholders of GAP Arca Holdings, Inc. will receive shares of common stock

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<sup>3</sup> Current Arca Holdings represents that the following persons currently own 5% or more of the shares of Current Arca Holdings: The Goldman Sachs Group, Inc., GAP Arca Holdings, Inc., Credit Suisse First Boston Next Fund, Inc., Fidelity Global Brokerage

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 will be cancelled.

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, holders of common stock will be entitled to vote on all matters submitted to the stockholders for a vote. New Arca Holdings may issue preferred stock in the future, the terms of which will be determined by the board of directors. In connection with the proposed initial public offering, Current Arca Holdings has filed a registration statement on Form S-1 with the Commission (File No. 333-113226).

New Arca Holdings will be governed under the direction of a board of directors. The number of directors shall be fixed by resolution of the board of directors, and is expected to be nine initially. Pursuant to New Arca Holdings' Certificate of Incorporation, for so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement among PCX, PCXE and Current Arca Holdings (the "Amended and Restated Facilities Agreement") is in effect, one member of New Arca Holdings' board of directors will be required to be a member of PCX's Board of Directors or an officer or employee of PCX nominated by the PCX Board of Directors. New Arca Holdings will have the following committees of the board of directors: an audit committee, a corporate governance and nominating committee and a compensation committee.

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Group, Inc., and Merrill Lynch L.P. Holdings Inc. Telephone conversation among Mai S. Shiver, Acting Director/Senior Counsel, PCX; Kevin O'Hara, Chief Administrative Officer and General Counsel, Current Arca Holdings; and David Hsu, Attorney, Division of Market Regulation ("Division"), Commission, on June 29, 2004.

Current Arca Holdings is currently the sole owner of ArcaEx. As a result of the conversion, New Arca Holdings will become the sole owner of ArcaEx. New Arca Holdings will operate ArcaEx as the equities trading facility of PCX and PCXE. After the conversion of Current Arca Holdings into New Arca Holdings, PCX and PCXE will continue to have regulatory and oversight obligations with respect to ArcaEx, and New Arca Holdings will operate the facility in a manner not inconsistent with the regulatory and oversight functions of PCX and PCXE. All persons using ArcaEx will continue to be subject to the PCXE rules. The regulatory relationship of PCX and PCXE to ArcaEx will not be affected by the conversion or the initial public offering. Certain provisions of the 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 unduly interfere with or restrict the ability of the Commission or PCX to effectively carry out its regulatory 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.

Certain provisions of the New Arca Holdings Certificate of Incorporation relating to ownership and voting limitations on New Arca Holdings' stockholders and to the regulatory oversight by the Commission, PCX and PCXE are summarized below. In addition, the requirements that must be met to amend the Certificate and Bylaws are summarized. The proposed terms of the Certificate of Incorporation and Bylaws of New Arca Holdings are available for viewing on the Commission's Web site, [www.sec.gov/rules/sro.shtml](http://www.sec.gov/rules/sro.shtml), and at PCX and the Commission.

(i) Voting Limitation.

Pursuant to the Certificate of Incorporation, no person,<sup>4</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 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 will apply unless and until (1) a person, either alone or with its related persons, delivers to the board of directors of New Arca Holdings a notice in writing, at least 45 days (or such shorter period as the board of directors of New Arca Holdings expressly consents to) 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 of directors of New Arca Holdings 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 of directors of New Arca Holdings 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

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<sup>4</sup> The Certificate of Incorporation defines “Person” to mean a natural person, company, government, or political subdivision, agency, or instrumentality of a government. New Arca Holdings Certificate of Incorporation, Article Fourth.H(2).

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>5</sup>

The Certificate of Incorporation defines “related persons” to mean with respect to any person (a) 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; (b) 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 Restated Facility Services Agreement is in full force and effect, any broker or dealer that is an ETP Holder (as defined in the PCXE rules of PCX, as such rules may be in effect from time to time) with which such natural person is associated; (c) 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; (d) 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 (e) 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>6</sup> PCX and PCXE believe that this

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<sup>5</sup> New Arca Holdings Certificate of Incorporation, Article Fourth.C.

<sup>6</sup> New Arca Holdings Certificate of Incorporation, Article Fourth.H(3). 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

definition will permit New Arca Holdings to monitor the ownership of its stock by monitoring filings on Schedules 13D and 13G by its stockholders. In addition, stockholders will be able to effectively monitor their shareholdings in New Arca Holdings using systems they already have in place.

In approving any such resolution, the board of directors of New Arca Holdings must 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 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. In making such determinations, the board of directors of New Arca Holdings 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.<sup>7</sup>

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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>7</sup> New Arca Holdings Certificate of Incorporation, Article Fourth.C.

If votes are cast in excess of the Voting Limitation, New Arca Holdings shall disregard such votes cast in excess of the Voting Limitation. The provisions described in this section shall 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.<sup>8</sup>

PCX and PCXE believe that these provisions would prevent any stockholder, or any stockholders acting together, from exercising undue control over the operation of New Arca Holdings and, therefore, ArcaEx. Specifically, PCX and PCXE believe that these provisions are designed to prohibit any person, either alone or with its related persons, from having the power to control a substantial number of outstanding votes entitled to be cast on any matter without Commission review. PCX and PCXE believe that the imposition of a voting limitation on any person that, either alone or with its related persons, owns more than 20% of the then outstanding votes entitled to be cast on any matter, would help ensure that New Arca Holdings would not be subject to undue influence from a stockholder or group of stockholders that controls a substantial number of outstanding votes entitled to be cast on any matter that may be adverse to PCX's, PCXE's and the Commission's regulatory oversight responsibilities. These provisions, along with the related ownership limitations discussed below, would serve to protect the integrity of PCX's, PCXE's and the Commission's regulatory oversight responsibilities and would allow the Commission to review, and subject to public notice and comment, the acquisition of substantial voting power by any stockholder and its related persons.

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<sup>8</sup> Id.

(ii) Ownership Limitations.

Concentration Limitation. Pursuant to the Certificate of Incorporation, no person, either alone or with its related persons, may 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>9</sup> The 40% ownership limitation will apply unless and until (1) a person, either alone or with its related persons, delivers to the board of directors of New Arca Holdings a notice in writing, at least 45 days (or such shorter period as the board of directors of New Arca Holdings expressly consents to) 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 by the board of directors of New Arca Holdings and the Commission to exceed the 40% ownership limitation. Specifically, (1) the board of directors of New Arca Holdings 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>10</sup>

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<sup>9</sup> 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 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.

Currently, no person or related persons owns more than 40% of the shares of Current Arca Holdings. Telephone conversation among Mai S. Shiver, Acting Director/Senior Counsel, PCX; Kevin O'Hara, Chief Administrative Officer and General Counsel; and David Hsu, Attorney, Division, Commission, on June 29, 2004.

<sup>10</sup> New Arca Holdings Certificate of Incorporation, Article Fourth.D(1).

In approving any such resolution, the board of directors of New Arca Holdings must 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 of directors of New Arca Holdings 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.<sup>11</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 prior approval, 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>12</sup>

PCX and PCXE believe that these provisions would provide the Commission with the authority to review and subject to public notice and comment any substantial acquisition of ownership of shares of stock of New Arca Holdings with the power to vote that may allow a person, either

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<sup>11</sup> Id.

<sup>12</sup> Id. New Arca Holdings will 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.

alone or with its related persons, to control New Arca Holdings and which the Commission may deem to have the potential to affect PCX's, PCXE's and the Commission's regulatory oversight responsibilities regarding ArcaEx.

Limitation on Ownership by ETP Holders. Notwithstanding any other provision of the Certificate of Incorporation other than paragraph (2)(b) of Section (D) of Article Fourth, as described in the next paragraph, 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, may 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>13</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 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>14</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, 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>15</sup> Members of Current Arca Holdings qualifying for this exemption may not increase

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<sup>13</sup> New Arca Holdings Certificate of Incorporation, Article Fourth.D(2).

<sup>14</sup> New Arca Holdings will 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>15</sup> New Arca Holdings Certificate of Incorporation, Article Fourth.D(2). Currently, only one member of Current Arca Holdings that is an ETP Holder owns more than 20% of the

their beneficial ownership of New Arca Holdings above their beneficial ownership at the time of the initial public offering.

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 ownership limitation applicable to ETP Holders.<sup>16</sup> In practical terms, this limitation would apply only in situations where a stockholder is the record owner of shares.

For the purposes of the 40% ownership limitation and the ownership limitation applicable to ETP Holders, no person shall 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, 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).<sup>17</sup>

(iii) New Arca Holdings' Right to Require Information from Stockholders.

Pursuant to the Certificate of Incorporation, the board of directors of New Arca Holdings has the right to require any person and its related persons reasonably believed (1) to be subject to the 20% voting limitation or the prohibition on certain agreements not to vote shares of stock of

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shares of Current Arca Holdings. Telephone conversation among Mai S. Shiver, Acting Director/Senior Counsel, PCX; Kevin O'Hara, Chief Administrative Officer and General Counsel, Current Arca Holdings; and David Hsu, Attorney, Division, Commission, on June 29, 2004.

<sup>16</sup> New Arca Holdings Certificate of Incorporation, Article Fourth.D(3).

<sup>17</sup> New Arca Holdings Certificate of Incorporation, Article Fourth.D(4).

New Arca Holdings, (2) to own beneficially (within the meaning of Rules 13d-3 and 13d-5 under the Act) shares of stock of New Arca Holdings entitled to vote on any matter in excess of the 40% ownership limitation, (3) to own beneficially (within the meaning of Rules 13d-3 and 13d-5 under the Act) 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 Article Fourth of the Certificate of Incorporation as may reasonably be requested of such person and its related persons.<sup>18</sup>

PCX and PCXE believe that this provision would enable 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, is in violation of the voting and ownership limitations set forth in the Certificate of Incorporation.

(iv) Responsibilities of the Directors.

Pursuant to the Certificate of Incorporation, in discharging his or her responsibilities as a member of the board of directors of New Arca Holdings, each director shall 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

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<sup>18</sup> New Arca Holdings Certificate of Incorporation, Article Fourth.G.

Arca Holdings to engage in conduct that fosters and does not interfere with PCX's, PCXE's and New Arca Holdings's 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. In addition, in discharging his or her responsibilities as a member of the board of directors of New Arca Holdings, 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>19</sup>

PCX and PCXE believe that these provisions would help ensure that directors of New Arca Holdings are cognizant of and take into account, when carrying out their duties and responsibilities as directors of New Arca Holdings, the fact that New Arca Holdings would operate a trading facility of an exchange that is subject to regulatory oversight by such exchange and the Commission and that the facility is required to be operated in compliance with federal securities laws. PCX and PCXE believe that these provisions also would help ensure that PCX, PCXE and the Commission are able to effectively fulfill their regulatory obligations with respect to ArcaEx.

(v) 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

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<sup>19</sup> New Arca Holdings Certificate of Incorporation, Article Tenth.

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>20</sup> If a 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>21</sup>

PCX and PCXE believe that these provisions would help to ensure that no person that is subject to any statutory disqualification (as defined in Section 3(a)(39) of the Act) would be able to unduly influence the operation of ArcaEx and interfere with the ability of PCX, PCXE and the Commission to carry out their regulatory responsibilities under the Act.

(vi) Amendments to the Certificate of Incorporation and Bylaws.

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, (1) any amendment to the Certificate of Incorporation must be submitted by the board of directors of New Arca Holdings 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 rules promulgated thereunder, then such amendment shall not be filed with the Secretary of State of the State of Delaware until filed with, or filed and approved by, the Commission, as the case may be, and (2)

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<sup>20</sup> New Arca Holdings Certificate of Incorporation, Article Fourth.E and Article Ninth.

<sup>21</sup> New Arca Holdings Certificate of Incorporation, Article Fourth.E. New Arca Holdings will 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.

any resolution of the board of directors of New Arca Holdings authorizing a proposed amendment to the Certificate of Incorporation shall provide that such amendment shall be abandoned and not filed with the Secretary of State of the State of Delaware, notwithstanding stockholder approval of such amendment, unless the conditions of clause (x) of Article Nineteenth of the Certificate of Incorporation, as described in clause (1) of this paragraph, have been fulfilled.<sup>22</sup> In short, if the Board of Directors of PCX determines that an amendment to the Certificate of Incorporation 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 amendment will not become effective until it becomes effective pursuant to this rule filing process.

Pursuant to the Bylaws, for so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect, before any amendment to the Bylaws may be effective, such amendment shall be submitted to the Board of Directors of PCX and, if the Board of Directors of PCX determines that the 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 rules promulgated thereunder, then such amendment shall not be effective until it becomes effective pursuant to this rule filing process.<sup>23</sup>

PCX and PCXE believe that these provisions would help to preserve the ability of PCX and PCXE to carry out their regulatory responsibilities under the Act and would help to provide the Commission with the ability to review and subject to public notice and comment any changes in the Certificate of Incorporation and Bylaws that could have the potential to affect PCX's, PCXE's and the Commission's regulatory responsibilities regarding ArcaEx.

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<sup>22</sup> New Arca Holdings Certificate of Incorporation, Article Nineteenth.

<sup>23</sup> New Arca Holdings Bylaws, Section 6.8(b).

(vii) PCX Director.

Pursuant to the Certificate of Incorporation, one member of New Arca Holdings' board of directors shall be a member of PCX's Board of Directors or an officer or employee of PCX nominated by the PCX Board of Directors for so long as ArcaEx is a facility of PCX and PCXE and the Amended and Restated Facility Services Agreement is in effect. 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 directors of New Arca Holdings, the board of directors of New Arca Holdings shall appoint a director nominated by the PCX Board of Directors.<sup>24</sup>

PCX and PCXE believe that these provisions would help to ensure that PCX and PCXE have the ability to participate in decisions relating to, and express views about, matters related to PCX's and PCXE's regulatory responsibilities discussed by the board of directors of New Arca Holdings, and would facilitate PCX's, PCXE's and the Commission's ability to effectively perform their regulatory oversight responsibilities with regard to ArcaEx.

(viii) 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>25</sup> PCX and PCXE believe that these provisions are designed to help ensure

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<sup>24</sup> New Arca Holdings Certificate of Incorporation, Article Eighth.

<sup>25</sup> New Arca Holdings Certificate of Incorporation, Article Tenth.

that PCX, PCXE and the Commission are able to effectively fulfill their regulatory obligations with respect to ArcaEx.

(ix) 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 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. 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 administration of ArcaEx as a facility of PCX

and PCXE. New Arca Holdings' books and records relating to ArcaEx shall be maintained within the United States.<sup>26</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, directors and employees of PCX and PCXE for purposes of and subject to oversight pursuant to the Act.<sup>27</sup>

PCX and PCXE believe that these provisions would help to ensure access to New Arca Holdings' books and records by the Commission, and, to the extent New Arca Holdings' books and records relate to the operation or administration of ArcaEx as a facility of PCX and PCXE, by PCX and PCXE, which would help enable PCX, PCXE and the Commission to carry out their regulatory responsibilities regarding ArcaEx.

(x) 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,

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<sup>26</sup> New Arca Holdings Certificate of Incorporation, Article Fourteenth.

<sup>27</sup> New Arca Holdings Certificate of Incorporation, Article Fifteenth. PCXE Rule 14.3(b) currently provides that all officers and directors of Current Arca Holdings shall be deemed to be officers and directors of PCX and PCXE for purposes of and subject to oversight pursuant to the Act.

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>28</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

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<sup>28</sup> New Arca Holdings Certificate of Incorporation, Article Thirteenth.

consent in writing to the applicability to them of such provisions, as applicable, prior to the consummation of the initial public offering.<sup>29</sup>

Pursuant to this provision, New Arca Holdings would require its directors and officers, and those of its employees whose principal place 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 would 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. PCX and PCXE believe that it is imperative that regulatory cooperation is assured from such people. Accordingly, PCX and PCXE believe that these provisions are designed to ensure that, should an occasion arise that requires regulatory cooperation or submission to jurisdiction from such persons, it would be forthcoming and uncontested.

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<sup>29</sup> New Arca Holdings Certificate of Incorporation, Article Eighteenth.

New Arca Holdings Certificate of Incorporation, Article Tenth 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.

New Arca Holdings Certificate of Incorporation, Article Thirteenth 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.

New Arca Holdings Certificate of Incorporation, Article Fifteenth 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.

(xi) 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>30</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>31</sup> PCX and PCXE believe that these provisions would help to ensure that New Arca Holdings does not interfere with the Commission's, PCX's and PCXE's regulatory responsibilities by ensuring that New Arca Holdings complies with federal securities laws, cooperates 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, and takes reasonable steps to ensure that its agents do not interfere with the Commission's, PCX's and PCXE's ability to carry out their regulatory responsibilities.

2. Statutory Basis

The Exchange believes that this filing is consistent with Section 6(b)<sup>32</sup> of the Act, in general, and furthers the objectives of Section 6(b)(1),<sup>33</sup> in particular, in that it enables the

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<sup>30</sup> New Arca Holdings Certificate of Incorporation, Article Sixteenth.

<sup>31</sup> New Arca Holdings Certificate of Incorporation, Article Seventeenth.

<sup>32</sup> 15 U.S.C. 78f(b).

<sup>33</sup> 15 U.S.C. 78f(b)(1).

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>34</sup> in particular, because the rules summarized herein would create a governance and regulatory structure with respect to the operation of ArcaEx 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.

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

No written comments were either solicited or received.

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 Exchange consents, the Commission will:

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<sup>34</sup> 15 U.S.C. 78f(b)(5).

- A. by order approve the proposed 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 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

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 File Number SR-PCX-2004-56 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>35</sup>

Margaret H. McFarland  
Deputy Secretary

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