

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-53383; File No. SR-PCX-2005-134)

February 27, 2006

Self-Regulatory Organizations; Pacific Exchange, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 Relating to the Certificate of Incorporation and Bylaws of Archipelago Holdings, Inc.

I. Introduction

On December 5, 2005, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² the Pacific Exchange, Inc. (“PCX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change in connection with the proposed merger (“Merger”) of New York Stock Exchange, Inc., a New York Type A not-for-profit corporation (“NYSE”), and Archipelago Holdings, Inc., a Delaware corporation and the parent company of the Exchange (“Archipelago”). On December 15, 2005, the Exchange amended its proposal.³ The proposed rule change, as amended, was published for comment on January 12, 2006.⁴ On February 13, 2006, the Exchange filed Amendment No. 2.⁵ This order approves the proposed rule change, as amended, grants accelerated approval to Amendment No. 2 to the proposed rule change, and solicits comments from interested persons on Amendment No. 2.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaced PCX’s original filing in its entirety.

⁴ Securities Exchange Act Release No. 53077 (January 9, 2006), 71 FR 2095.

⁵ In Amendment No. 2, the Exchange clarified that the proposed rule change would become operative concurrently with the closing of the Merger. The complete text of Amendment No. 2 is available on the Commission’s Web site (<http://www.sec.gov/rules/sro.shtml>), at the Commission’s Public Reference Room, at the Exchange, and on PCX’s Web site (<http://www.pacificex.com>).

After careful review, the Commission finds the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁶ In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(1) of the Act,⁷ which requires a national securities exchange to be so organized and have the capacity 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 proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,⁸ in that it is designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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.

A. Accelerated Approval of Amendment No. 2

The Commission also finds good cause for approving Amendment No. 2 to the proposed rule change prior to the thirtieth day after publishing notice of Amendment No. 2 in the Federal Register pursuant to Section 19(b)(2) of the Act.⁹

In Amendment No. 2, the Exchange represented that the proposed rule change would be operative concurrently with the closing of the Merger. Amendment No. 2 does not otherwise

⁶ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁷ 15 U.S.C. 78f(b)(1).

⁸ 15 U.S.C. 78f(b)(5).

⁹ 15 U.S.C. 78s(b)(2). Pursuant to Section 19(b)(2) of the Act, 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 finds good cause for so doing.

modify or change PCX's proposal. The Commission believes that Amendment No. 2 clarifies the timing of the rule changes proposed by PCX, raises no novel issues, and is consistent with the Act. Therefore, the Commission finds good cause exists to accelerate approval of Amendment No. 2, pursuant to Section 19(b)(2) of the Act.¹⁰

B. Solicitation of Comment

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether Amendment No. 2 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. Please include File Number SR-PCX-2005-134 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-PCX-2005-134. 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

¹⁰ 15 U.S.C. 78s(b)(2).

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 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 Amendment No. 2 of File Number SR-PCX-2005-134 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

C. Comments on the Proposal

The Commission received four comment letters on the proposed rule change.¹¹ PCX filed a response to the comment letters on February 9, 2006 and a further response on February 27, 2006.¹² Each of the commenters expressed concern about Gerald Putnam's fitness to serve as an officer of NYSE Group, Inc. ("NYSE Group") or to lead the NYSE upon consummation of the Merger.¹³

¹¹ See letters from James L. Kopecky, Attorney, James L. Kopecky, P.C., to Christopher Cox, Chairman, Commission, dated January 16, 2006 ("Kopecky Letter"); Michael Kanovitz, Attorney, Loevy & Loevy, to Nancy M. Morris, Secretary, Commission, dated February 2, 2006 (enclosing a statement from Lewis J. Borsellino to the Commission); Philip J. Nathanson, Attorney, Philip J. Nathanson & Associates, to Christopher Cox, Chairman, Commission, dated February 3, 2006 (following up on the Kopecky Letter); and letter from Fane Lozman to Christopher Cox, Chairman, Commission, dated February 22, 2006, with attachments (responding to PCX Response to Comments, infra note 12).

¹² See letters from Kevin J. P. O'Hara, Chief Administrative Officer, General Counsel & Secretary, PCX, to Nancy M. Morris, Secretary, Commission, dated February 8, 2006 ("PCX Response to Comments") and February 24, 2006.

¹³ After the Merger, NYSE Group will be a publicly traded company and the holding company for the businesses of the NYSE and Archipelago. New York Stock Exchange LLC will be a wholly-owned subsidiary of NYSE Group and will succeed to the registration of the NYSE as a national securities exchange. Mr. Putnam is currently the chairman of the board of directors and chief executive officer of Archipelago and the

The issue of Mr. Putnam’s fitness to serve as an officer or director of a public company or the NYSE is not before the Commission in the context of this rule filing. Pursuant to Section 19(b)(1) of the Act,¹⁴ a self-regulatory organization (“SRO”) (such as PCX) is required to file with the Commission any proposed rule or any proposed change in, addition to, or deletion from the rules of such SRO. Further, pursuant to Section 19(b)(2) of the Act,¹⁵ the Commission shall approve a proposed rule change filed by an SRO if the Commission finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the SRO. PCX is not providing in this filing for any particular person to serve as an officer or director of NYSE Group or any of its subsidiaries. In addition, Section 19(h)(4) of the Act¹⁶ authorizes the Commission, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act, to remove or censure an officer or director of a national securities exchange if it finds, after notice and opportunity for a hearing, that such officer or director has willfully violated any provision of the Act, the rules or regulations thereunder, or the rules of such exchange, willfully abused his authority, or without reasonable justification or excuse has failed to enforce compliance with any such provision by any member or person associated with a member.

II. Discussion

On April 20, 2005, the NYSE and Archipelago entered into an Agreement and Plan of

chairman of PCX. Upon completion of the Merger, it is intended that Mr. Putnam will be named as co-president and chief operating officer of NYSE Group. See PCX Response to Comments, supra note 12, at 2.

¹⁴ 15 U.S.C. 78s(b)(1).

¹⁵ 15 U.S.C. 78s(b)(2).

¹⁶ 15 U.S.C. 78s(h)(4).

Merger (“Merger Agreement”).¹⁷ Following the Merger, the businesses of the NYSE and Archipelago will be held under a single, publicly traded holding company, NYSE Group. In the Merger, NYSE members will receive cash and/or shares of NYSE Group common stock, and Archipelago stockholders will receive solely shares of NYSE Group common stock.

PCX proposes to allow NYSE Group and its related persons to wholly own and vote all of the outstanding capital stock of Archipelago upon consummation of the Merger, subject to certain exceptions described herein. PCX also proposes certain new rules of PCX and PCX Equities, Inc. (“PCXE”) prohibiting certain relationships between NYSE Group and PCX members. Finally, PCX proposes to amend the rules of PCX and PCXE to impose restrictions on certain rights of PCX members with respect to the nomination and election of the directors of PCX and PCXE.

A. NYSE Group Ownership of Archipelago

The Archipelago Certificate of Incorporation imposes certain limitations on ownership and voting of Archipelago stock, unless waived by the board of directors of Archipelago (“Archipelago Board”) and approved by the Commission.

1. Current PCX Rules

a. Ownership Limitation in the Archipelago Certificate of Incorporation

The Archipelago Certificate of Incorporation currently provides that no person,¹⁸ either

¹⁷ See Amendment No. 3 to the Registration Statement on Form S-4, Registration No. 333-126780, filed with the Commission on November 3, 2005, for a description of the Merger Agreement and the transactions contemplated thereby. See also Securities Exchange Act Release No. 53382 (February 27, 2006) (SR-NYSE-2005-77) (“NYSE Order”).

¹⁸ See Archipelago Certificate of Incorporation, Article Fourth H(2) for the definition of a “Person.”

alone or together with its related persons,¹⁹ may own beneficially shares of Archipelago stock representing in the aggregate more than 40% of the then outstanding votes entitled to be cast on any matter (“Ownership Limitation”). The Ownership Limitation will apply unless and until (1) a person, either alone or with its related persons, delivers to the Archipelago Board a notice in writing regarding its intention to acquire shares of Archipelago stock that would cause such person, either alone or with its related persons, to own beneficially shares of stock of Archipelago in excess of the Ownership Limitation, at least 45 days (or such shorter period as the Archipelago Board may expressly consent) prior to the intended acquisition, and (2) such person, either alone or with its related persons, receives prior approval by the Archipelago Board and the Commission to exceed the Ownership Limitation.²⁰ Specifically, (1) the Archipelago Board must adopt a resolution approving such person and its related persons to exceed the Ownership Limitation, (2) the resolution must be filed with the Commission under Section 19(b) of the Act,²¹ and (3) such proposed rule change must be approved by the Commission and become effective thereunder.²²

Pursuant to the Archipelago Certificate of Incorporation, subject to its fiduciary obligations under the Delaware General Corporation Law, as amended (“DGCL”), before adopting any such resolution, the Archipelago Board must first determine that: (1) such acquisition of beneficial ownership by such person, either alone or with its related persons, would not impair any of Archipelago’s, PCX’s, or PCXE’s ability to discharge its responsibilities under the Act and the rules and regulations thereunder and is otherwise in the

¹⁹ See Archipelago Certificate of Incorporation, Article Fourth H(3) for the definition of “Related Persons.”

²⁰ Archipelago Certificate of Incorporation, Article Fourth D(1)(a).

²¹ 15 U.S.C. 78s(b).

²² Archipelago Certificate of Incorporation, Article Fourth D(1)(a).

best interests of Archipelago 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.²³

In addition, the Archipelago Certificate of Incorporation provides that for so long as Archipelago Exchange, L.L.C. (“ArcaEx”) remains a facility of PCX and PCXE and the Facility Services Agreement among Archipelago, PCX, and PCXE, dated as of March 22, 2002 (“Facility Services Agreement”), which currently governs the regulatory relationship of PCX and PCXE to ArcaEx, remains in full force and effect, no Equity Trading Permit Holder (“ETP Holder”),²⁴ either alone or with its related persons, shall be permitted at any time to own beneficially shares of Archipelago stock representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter.²⁵ Furthermore, unlike the Ownership Limitation described earlier, the Archipelago Certificate of Incorporation does not give the Archipelago Board the authority to waive the 20% ownership limitation with respect to ETP Holders and their related persons.

²³ Archipelago Certificate of Incorporation, Article Fourth D(1)(b). The term “statutory disqualification” is defined in Section 3(a)(39) of the Act, 15 U.S.C. 78c(a)(39). In making such determinations, the Archipelago Board may impose any conditions and restrictions on such person and its related persons owning any shares of stock of Archipelago entitled to vote on any matter as the Archipelago Board in its sole discretion deems necessary, appropriate, or desirable in furtherance of the objectives of the Act and the governance of Archipelago. Archipelago Certificate of Incorporation, Article Fourth D(1)(b).

²⁴ “ETP Holder” is defined in PCXE Rule 1.1.

²⁵ Archipelago Certificate of Incorporation, Article Fourth D(2).

b. Voting Limitation in the Archipelago Certificate of Incorporation

The Archipelago Certificate of Incorporation also currently provides that no person, either alone or with its related persons, shall be entitled to (1) vote or cause the voting of shares of Archipelago stock to the extent such shares represent in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter (“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, possess the right 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 (“Nonvoting Agreement Prohibition”).²⁶ The Voting Limitation and the Nonvoting Agreement Prohibition shall apply unless and until (1) a person, either alone or with its related persons, delivers to the Archipelago Board a notice in writing regarding such person’s intention to vote, possess the right to vote, or cause the voting of shares of Archipelago stock that would cause such person, either alone or with its related persons, to violate the Voting Limitation or the Nonvoting Agreement Prohibition, at least 45 days (or such shorter period as the Archipelago Board may expressly consent) prior to the intended vote and (2) such person, either alone or with its related persons, receives prior approval from the Archipelago Board and the Commission to exceed the Voting Limitation or enter into an agreement, plan, or arrangement not otherwise allowed pursuant to the Nonvoting Agreement Prohibition.²⁷ Specifically, (1) the Archipelago Board must adopt a resolution approving such person and its related persons to exceed the Voting Limitation or to enter into an agreement, plan, or arrangement not otherwise allowed pursuant to the Nonvoting Agreement Prohibition, (2) the resolution must be filed with the Commission under Section

²⁶ Archipelago Certificate of Incorporation, Article Fourth C(1).

²⁷ Archipelago Certificate of Incorporation, Article Fourth C(2).

19(b) of the Act,²⁸ and (3) such proposed rule change must be approved by the Commission and become effective thereunder.²⁹

Pursuant to the Archipelago Certificate of Incorporation, subject to its fiduciary obligations under the DGCL, before adopting any such resolution, the Archipelago Board must first 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 Archipelago's, 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 Archipelago 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;³⁰ and (4) in the case of a resolution to approve the exercise of voting rights in excess of the Voting Limitation, for so long as ArcaEx remains a facility of PCX and PCXE and the Facility Services Agreement is in full force and effect, neither such person nor its related persons are ETP Holders.³¹

²⁸ 15 U.S.C. 78s(b).

²⁹ Archipelago Certificate of Incorporation, Article Fourth C(2).

³⁰ See supra note 23.

³¹ Archipelago Certificate of Incorporation, Article Fourth C(3). In making such determinations, the Archipelago Board may impose any conditions and restrictions on such person and its related persons owning any shares of Archipelago stock entitled to vote on any matter as the Archipelago Board in its sole discretion deems necessary, appropriate, or desirable in furtherance of the objectives of the Act and the governance of Archipelago. Id.

c. Additional Matters Relating to OTP Holders and OTP Firms of PCX

Archipelago's amended and restated bylaws ("Archipelago Bylaws") provide that the Archipelago Board will not adopt any resolution waiving the Voting Limitation, the Nonvoting Agreement Prohibition, and the Ownership Limitation with respect to any Options Trading Permit Holder ("OTP Holder")³² or Options Trading Permit Firm ("OTP Firm")³³ or its related persons.³⁴ PCX rules provide that for as long as Archipelago controls, directly or indirectly, PCX, no OTP Holder or OTP Firm, either alone or together with its related persons, shall: (i) own beneficially shares of Archipelago stock representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter; (ii) have the right to vote, vote, or cause the voting of shares of Archipelago stock to the extent such shares represent in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter; or (iii) enter into any agreement, plan, or arrangement not to vote shares of Archipelago stock, the effect of which would enable any person, either alone or together with its related persons, to vote, possess the right to vote, or cause the voting of shares what would represent in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter.³⁵

2. Resolution of the Archipelago Board

Under the terms of the Merger Agreement, NYSE Group will wholly own and vote all of the outstanding capital stock of Archipelago upon consummation of the Merger. Absent a

³² "OTP Holder" is defined in PCX Rule 1.1.

³³ "OTP Firm" is defined in PCX Rule 1.1.

³⁴ Archipelago Bylaws, Section 6.8(d). This provision of the Archipelago Bylaws may not be amended, modified, or repealed unless such amendment, modification, or repeal is filed with and approved by the Commission or approved by Archipelago stockholders voting not less than 80% of the then outstanding votes entitled to be cast in favor of any such amendment, modification, or repeal. Archipelago Bylaws, Section 6.8(g).

³⁵ See PCX Rules 3.4(a) and (b).

waiver, the Merger would cause NYSE Group to violate the Ownership Limitation and the Voting Limitation. Accordingly, as required by the Archipelago Certificate of Incorporation, on October 19, 2005, NYSE Group delivered a written notice to the Archipelago Board requesting approval of its ownership and voting of Archipelago stock in excess of the Ownership Limitation and the Voting Limitation. On October 20, 2005, the Archipelago Board adopted a resolution approving the request.³⁶ The Exchange then filed the resolution with the Commission under Section 19(b) of the Act³⁷ and requested that, upon consummation of the Merger, NYSE Group be allowed to wholly own and vote all the outstanding common stock of Archipelago, either alone or with its related persons, except for any related person of NYSE Group that is an ETP Holder, an OTP Holder, or an OTP Firm.

The Commission notes that the NYSE Group Certificate of Incorporation imposes certain restrictions on NYSE Group stockholders' ability to own and vote shares of stock of NYSE Group similar to those contained in the Archipelago Certificate of Incorporation and PCX rules.³⁸ These ownership and voting limitations are designed to prevent a shareholder or group of shareholders acting together from exercising undue influence or control over the operations of

³⁶ In adopting the resolution approving NYSE Group's request, the Archipelago Board determined that (1) the acquisition of beneficial ownership of, and the exercise of voting rights with respect to, 100% of the outstanding shares of Archipelago common stock by NYSE Group, either alone or with its related persons, would not impair any of Archipelago's, PCX's, or PCXE's ability to discharge its responsibilities under the Act and the rules and regulations thereunder and are otherwise in the best interests of Archipelago and its stockholders; (2) such acquisition would not impair the Commission's ability to enforce the Act; (3) neither NYSE Group nor any of its related persons is subject to any statutory disqualification; and (4) neither NYSE Group nor any of its related persons is an ETP Holder, OTP Holder, or OTP Firm.

³⁷ 15 U.S.C. 78s(b).

³⁸ The Commission is today approving proposed rule changes filed by the NYSE in connection with the Merger. See NYSE Order, supra note 17.

NYSE Group’s regulated subsidiaries, including PCX and NYSE Regulation, Inc. (“NYSE Regulation”), which will carry out certain regulatory services on behalf of PCX.³⁹

Specifically, the NYSE Group Certificate of Incorporation provides that no person, either alone or together with its related persons, may at any time beneficially own shares of NYSE Group stock representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter.⁴⁰ The NYSE Group Certificate of Incorporation also provides that no person, either alone or together with its related persons, will be entitled to vote or cause the voting of shares of NYSE Group stock representing in the aggregate more than 10% of the total number of votes entitled to be cast on any matter, and no person, either alone or together with its related persons, may acquire the ability to vote more than 10% of the aggregate number of votes being cast on any matter by virtue of agreements entered into with other persons not to vote shares of NYSE Group’s outstanding capital stock.⁴¹ Moreover, the NYSE Group Certificate of Incorporation includes a provision restricting the NYSE Group board of directors (“NYSE Group Board”) from waiving these ownership and voting limitations for ETP Holders, OTP Holders, and OTP Firms that is analogous to provisions in the current Archipelago Certificate of Incorporation and Archipelago Bylaws. Specifically, like Archipelago, the NYSE Group Board

³⁹ PCX and NYSE Regulation intend to enter into a Regulatory Services Agreement specifying the regulatory functions that NYSE Regulation will perform.

⁴⁰ In the event that a person, either alone or together with its related persons, beneficially owns shares of stock of NYSE Group in excess of the 20% threshold, such person and its related persons will be obligated to sell promptly, and NYSE Group will be obligated to purchase promptly, at a price equal to the par value of such shares of stock and to the extent that funds are legally available for such purchase, that number of shares necessary to reduce the ownership level of such person and its related persons to below the permitted threshold, after taking into account that such repurchased shares will become treasury shares and will no longer be deemed to be outstanding. See NYSE Order, supra note 17.

⁴¹ NYSE Group will disregard any such votes purported to be cast in excess of this limitation. See id.

will be prohibited from waiving the applicable ownership and voting limitations in excess of 20% for ETP Holders, OTP Holders, and OTP Firms.⁴²

The Commission also notes that the NYSE Group Certificate of Incorporation contains certain other provisions designed to facilitate the ability of the regulated subsidiaries of NYSE Group and the Commission to fulfill their regulatory and oversight obligations under the Act. These provisions are analogous to provisions contained in the Archipelago Certificate of Incorporation and the Archipelago Bylaws and relate, in part, to the Commission's access to NYSE Group's books and records, the Commission's jurisdiction over NYSE Group and its officers, directors, and employees, the protection of confidential information, and the filing with the Commission of amendments to NYSE Group's governing documents. The Commission therefore finds that it is consistent with the Act, in particular Section 6(b)(1) of the Act,⁴³ to allow NYSE Group and its related persons, other than any related person of NYSE Group that is an ETP Holder, OTP Holder, or OTP Firm, to wholly own and vote all of the outstanding capital stock of Archipelago.

B. Certain Relationships Between NYSE Group and OTP Holders, OTP Firms, and ETP Holders

Upon consummation of the Merger, NYSE Group will become the parent company of Archipelago and the successor to the NYSE, New York Stock Exchange LLC. To protect the integrity and independence of the regulatory responsibilities of PCX and PCXE after the consummation of the Merger, PCX and PCXE propose certain new rules designed to minimize any potential conflicts of interest that may result from ownership relationships or affiliations

⁴² See id.

⁴³ 15 U.S.C. 78f(b)(1).

between OTP Holders, OTP Firms, and ETP Holders, i.e., PCX members, on the one hand and NYSE Group and its subsidiaries, including PCX and PCXE, on the other hand.

Specifically, proposed PCX Rule 3.10 and proposed PCXE Rule 3.10 provide that, unless approved by the Commission, (a) no OTP Holder, OTP Firm, or ETP Holder shall be affiliated⁴⁴ with NYSE Group or any of its affiliated entities, and (b) neither NYSE Group nor any of its affiliates shall hold, directly or indirectly, an ownership interest in any OTP Firm or ETP Holder. The proposed PCX and PCXE rules further provide that any person who fails to meet the requirements described in the preceding sentence shall not be eligible to become an OTP Holder, OTP Firm, or ETP Holder, as the case may be.⁴⁵ In addition, in the event of any failure by any OTP Holder, OTP Firm, or ETP Holder to comply with the applicable provisions of the proposed PCX Rule 3.10 and proposed PCXE Rule 3.10, PCX or PCXE shall suspend all trading rights and privileges of such OTP Holder, OTP Firm, or ETP Holder, as the case may be, in accordance with the proposed PCX and PCXE rules, subject to the procedures provided therein.⁴⁶

⁴⁴ A person “affiliated” with a specified person is a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the person specified. 17 CFR 240.12b-2.

⁴⁵ Proposed PCX Rule 3.10(c) and proposed PCXE Rule 3.10(c).

⁴⁶ The proposed PCX and PCXE rules provide that in the event of any such failure to comply with proposed PCX Rule 3.10 and proposed PCXE Rule 3.10, respectively, PCX or PCXE shall: (1) provide notice to the applicable OTP Holder, OTP Firm, or ETP Holder, as the case may be, within five business days of learning of the failure to comply; (2) allow the applicable OTP Holder, OTP Firm, or ETP Holder fifteen calendar days to cure any such failure to comply; (3) in the event that the applicable OTP Holder, OTP Firm, or ETP Holder does not cure such failure to comply within such fifteen calendar day cure period, schedule a hearing to occur within thirty calendar days following the expiration of such fifteen calendar day cure period; and (4) render its decision as to the suspension of all trading rights and privileges of the applicable OTP Holder, OTP Firm, or ETP Holder no later than ten calendar days following the date of such hearing. Proposed PCX Rule 13.2(a)(2)(F) and proposed PCXE Rule 11.2(a)(2)(v).

The Commission finds that proposed PCX Rule 3.10 and proposed PCXE Rule 3.10 are consistent with the Act, in particular Section 6(b)(1) of the Act.⁴⁷ These proposed rules are designed to minimize any potential conflicts of interest that may result from ownership relationships or affiliations between PCX members on the one hand and NYSE Group and its affiliates, including PCX and PCXE, on the other hand. By proscribing ownership and affiliation between these groups, the Commission believes that proposed PCX Rule 3.10 and proposed PCXE 3.10 will help protect the integrity and independence of the regulatory responsibilities of the Exchange after the consummation of the Merger.

C. Rights of OTP Holders and ETP Holders with Respect to the Nomination and Election of Their Representatives to the PCX Board and PCXE Board

The bylaws of PCX and PCXE (“PCX Bylaws” and “PCXE Bylaws,” respectively) contain certain compositional requirements with respect to the boards of directors of PCX and PCXE (“PCX Board” and “PCXE Board,” respectively). Specifically, the PCX Bylaws provide that at least 20% of the directors of PCX shall consist of individuals nominated by trading permit holders, with at least one director nominated by ETP Holders and at least one director nominated by OTP Holders.⁴⁸ The PCXE Bylaws provide that at least 20% of the directors (but no fewer than two directors) of PCXE shall be nominees of the ETP/Equity ASAP Nominating Committee, as provided under PCXE Rule 3.⁴⁹ The procedures for the nomination, appointment, and election of the directors of PCX and PCXE are governed by PCX and PCXE rules.⁵⁰ To ensure that the director nomination and election processes of each of PCX and PCXE are not

⁴⁷ 15 U.S.C. 78f(b)(1).

⁴⁸ PCX Bylaws, Section 3.02(a).

⁴⁹ PCXE Bylaws, Section 3.02(a).

⁵⁰ PCX Rule 3.2(b)(2) and PCXE Rule 3.2(b)(2).

subject to any undue influence from the concentration of rights in any one OTP Holder⁵¹ or ETP Holder, either alone or together with certain affiliates, PCX proposes to amend its rules and PCXE's rules to limit the participation of affiliated OTP Holders and ETP Holders in the director nomination and election processes.

Specifically, PCX rules currently provide that the PCX nominating committee ("PCX Nominating Committee") shall have seven members, consisting of six OTP Holders and one person from the public. The PCX Nominating Committee must nominate any candidate for these OTP Holders' positions on the PCX Nominating Committee endorsed by the written petition of the lesser of 35 OTP Holders or 10% of OTP Holders. PCX proposes that no OTP Holder, either alone or together with (x) other OTP Holders associated with the same OTP Firm that such OTP Holder is associated with⁵² and (y) OTP Holders associated with OTP Firms that are affiliated⁵³ with the OTP Firm that such OTP Holder is associated with, may account for more than 50% of the signatories to the petition endorsing a particular petition nominee for an OTP Holders' position on the PCX Nominating Committee.

PCX rules also currently provide that, in the event that there are more than six nominees to fill the OTP Holders' positions on the PCX Nominating Committee as a result of petition by OTP Holders, the PCX Nominating Committee must submit the nominees to OTP Holders for

⁵¹ Even though OTP Firms also hold options trading permits, they do not have any voting rights with respect to the nomination and election of the OTP Holder representative on the PCX Board.

⁵² The term "associated person of a broker or dealer" means any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer, except that such term does not include any person associated with a broker or dealer whose functions are solely clerical or ministerial. 15 U.S.C. 78c(a)(18).

⁵³ See supra note 43.

election.⁵⁴ PCX proposes that no OTP Holder, either alone or together with (x) other OTP Holders associated with the same OTP Firm that such OTP Holder is associated with and (y) OTP Holders associated with OTP Firms that are affiliated with the OTP Firm that such OTP Holder is associated with, may account for more than 20% of the votes cast for a particular nominee for an OTP Holders' position on the PCX Nominating Committee.

With respect to the nomination and election of the OTP Holder representative on the PCX Board, PCX rules currently provide that, in addition to the candidate nominated by the PCX Nominating Committee for the OTP Holders' position on the PCX Board, the PCX Nominating Committee must nominate any eligible candidate endorsed by the written petition of the lesser of 35 OTP Holders or 10% of OTP Holders in good standing on or before the tenth business day after the PCX Nominating Committee publishes its nominee for the PCX Board.⁵⁵ PCX proposes that no OTP Holder, either alone or together with (x) other OTP Holders associated with the same OTP Firm that such OTP Holder is associated with and (y) OTP Holders associated with OTP Firms that are affiliated with the OTP Firm that such OTP Holder is associated with, may account for more than 50% of the signatories to the petition endorsing a particular petition nominee for the OTP Holders' position on the PCX Board.

In addition, PCX rules currently provide that if there are two or more nominees for the PCX Holder's position on the PCX Board as a result of petition by OTP Holders, the PCX Nominating Committee must submit the contested nomination(s) to OTP Holders for election.⁵⁶ PCX proposes that no OTP Holder, either alone or together with (x) other OTP Holders associated with the same OTP Firm that such OTP Holder is associated with and (y) OTP

⁵⁴ PCX Rules 3.2(b)(2)(B).

⁵⁵ PCX Rule 3.2(b)(2)(C)(ii).

⁵⁶ PCX Rule 3.2(b)(2)(C)(iii).

Holders associated with OTP Firms that are affiliated with the OTP Firm that such OTP Holder is associated with, may account for more than 20% of the votes cast for a particular nominee for the OTP Holders' position on the PCX Board.

Similarly, PCXE rules currently provide that the PCXE nominating committee ("PCXE Nominating Committee") shall have seven members, consisting of six ETP Holders and one person from the public. The PCXE Nominating Committee must nominate any candidate for these ETP Holders' positions on the PCXE Nominating Committee endorsed by the written petition of at least 10% of ETP Holders. PCX proposes that no ETP Holder, either alone or together with other ETP Holders who are deemed its affiliates,⁵⁷ may account for more than 50% of the signatories to the petition endorsing a particular petition nominee for an ETP Holders' position on the PCXE Nominating Committee.

PCXE rules also currently provide that in the event that there are more than six nominees to fill the ETP Holders' positions on the PCXE Nominating Committee as a result of petition by ETP Holders, the PCXE Nominating Committee must submit the nominees to ETP Holders for election.⁵⁸ PCX proposes that no ETP Holder, either alone or together with other ETP Holders who are deemed its affiliates, may account for more than 20% of the votes cast for a particular nominee for an ETP Holders' position on the PCXE Nominating Committee.

With respect to the nomination and election of the ETP Holder representatives on the PCX Board and PCXE Board, PCXE rules currently provide that in addition to the candidates nominated by the PCXE Nominating Committee for the ETP Holders' positions on the PCX Board and PCXE Board, the PCXE Nominating Committee must nominate any eligible candidate endorsed by the written petition of at least 10% of ETP Holders in good standing to the

⁵⁷ See supra note 43.

⁵⁸ PCXE Rules 3.2(b)(2)(B)(iii).

PCX Board or PCXE Board, as the case may be, within the time period set forth in PCXE rules.⁵⁹ PCX proposes that no ETP Holder, either alone or together with other ETP Holders who are deemed its affiliates, may account for more than 50% of the signatories to a petition endorsing a particular petition nominee for an ETP Holders' position on the PCX Board or PCXE Board.

In addition, PCXE rules also currently provide that if there are three or more nominees for the ETP Holders' positions on the PCXE Board or two or more nominees for the ETP Holder's position on the PCX Board, the PCXE Nominating Committee shall submit the contested nomination(s) to the ETP Holders for election.⁶⁰ PCX proposes that no ETP Holder, either alone or together with other ETP Holders who are deemed its affiliates, may account for more than 20% of the votes cast for a particular nominee for an ETP Holders' position on the PCX Board or PCXE Board.⁶¹

The Commission finds that these proposed PCX and PCXE rules related to the director nomination and election process are consistent with the Act, in particular Section 6(b)(3) of the Act.⁶² These proposed rule changes, which will limit the ability of affiliated OTP Holders or ETP Holders to control such process, should serve to strengthen and improve fair representation of all members. The Commission therefore believes that the proposal will help to protect PCX and PCXE Boards from any inappropriate influences of a group of related OTP Holders or ETP Holders.

⁵⁹ PCXE Rule 3.2(b)(2)(C)(i).

⁶⁰ PCXE Rule 3.2(b)(2)(C)(ii).

⁶¹ Aside from trading rights that such permit holders are entitled to and rights described in this section, the Exchange represents that permit holders have no other voting, nomination, petition, or other rights under the organizational documents and rules of PCX and PCXE, as applicable.

⁶² 15 U.S.C. 78f(b)(3).

D. SIP Registration

Section 11A(b)(1) of the Act⁶³ provides for the registration with the Commission of a securities information processor (“SIP”)⁶⁴ that is acting as an exclusive processor.⁶⁵ Because ArcaEx engages on an exclusive basis on behalf of the Exchange in collecting, processing, or preparing for distribution or publication information with respect to transactions or quotations on or effected or made by means of a facility of the Exchange, it is an exclusive processor that is required to register pursuant to Section 11A(b) of the Act.⁶⁶

Section 11A(b)(1) of the Act⁶⁷ provides that the Commission may, by rule or order, upon its own motion or upon application by a SIP, conditionally or unconditionally exempt any SIP from any provision of Section 11A of the Act or the rules or regulation thereunder, if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of Section 11A of the Act, including the maintenance of fair and orderly markets in securities and the removal of impediments to and perfection of the mechanism of a national market system.⁶⁸

The Commission has determined to grant ArcaEx a temporary exemption from registration under Section 11A(b)(1) of the Act and Rule 609 thereunder for a period of thirty

⁶³ 15 U.S.C. 78k-1(b)(1).

⁶⁴ See Section 3(a)(22)(A) of the Act, 15 U.S.C. 78c(a)(22)(A), for the definition of a SIP. An SRO is explicitly excluded from the definition of a SIP.

⁶⁵ Section 3(a)(22)(B) of the Act, 15 U.S.C. 78c(a)(22)(B), defines an exclusive processor. Rule 609 under the Act, 17 CFR 242.609, requires that the registration of a SIP be on Form SIP, 17 CFR 249.1001.

⁶⁶ 15 U.S.C. 78k-1(b)(1). An SRO that is an exclusive processor is exempt from registration under Section 11A(b)(1) of the Act because it is excluded from designation as a SIP.

⁶⁷ 15 U.S.C. 78k-1(b)(1).

⁶⁸ 15 U.S.C. 78k-1(b)(1). See also Rule 609(c), 17 CFR 242.609(c).

(30) days from the date of closing of the Merger, while an application for registration or an application for an exemption pursuant to Section 11A(b)(1) of the Act and Rule 609 thereunder is prepared.⁶⁹ The Commission also has determined to grant a conditional continuation of the 30-day temporary exemption from registration of ArcaEx, conditioned upon its filing of an application for registration or application for an exemption from registration within the 30-day time period. Such continuation shall continue for a period of 90 days following the end of the 30-day period and will afford interested persons an opportunity to submit written comments concerning the application filed with the Commission.⁷⁰

ArcaEx currently operates the equities trading facility of PCX and is regulated as a facility of PCX.⁷¹ The Commission therefore finds that such temporary exemptions are consistent with the public interest, the protection of investors, and the purposes of Section 11A

⁶⁹ See Securities Exchange Act Release No. 12079 (February 6, 1976) (order granting temporary exemption from SIP registration for Nasdaq for (1) a period of 30 days following the consummation of the sale of the Nasdaq system to the NASD and the assignment of the NASD's rights in such purchase to Nasdaq, a subsidiary of the NASD and (2) an additional period of ninety (90) days following the day of publication of notice of filing of an application for registration or exemption from registration, if such application is received within the original 30 days). See also Securities Exchange Act Release Nos. 13278 (February 17, 1977) (granting Bradford National Clearing Corporation, which was to perform SIP functions for the Pacific Exchange, a 90-day temporary exemption from registration as a SIP pending Commission determination of Bradford's application for a permanent exemption, such 90-day period to begin from the consummation of the agreement calling for Bradford's assumption of the SIP services) and 27957 (April 27, 1990), 55 FR 19140 (May 8, 1990) (granting the NASD a 90-day temporary exemption from registration of its subsidiary, Market Services, Inc., which was to operate the NASD's PORTAL market, as a SIP pending Commission review of its application for registration filed with the Commission).

⁷⁰ Publication of notice of the filing of an application for registration is required by Section 11A(b)(3) of the Act, 15 U.S.C. 78k-1(b)(3).

⁷¹ See Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001).

of the Act. The exemptions are for a limited period of time during which the Commission will have regulatory authority over ArcaEx.

III. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁷² that the proposed rule change (SR-PCX-2005-134), as amended, is approved and Amendment No. 2 is approved on an accelerated basis.

IT IS THEREFORE FURTHER ORDERED, pursuant to Section 11A(b)(1) of the Act,⁷³ that ArcaEx shall be exempt from registration as a securities information processor for a period of thirty (30) days following the date of closing of the Merger.

IT IS THEREFORE FURTHER ORDERED, pursuant to Section 11A(b)(1) of the Act,⁷⁴ that upon the filing by ArcaEx of an application for registration or an exemption from registration as a securities information processor within the 30-day period prescribed above, ArcaEx shall be exempt from registration as a securities information processor for an additional period of ninety (90) days following the end of the original 30-day period.

By the Commission (Chairman Cox and Commissioners Glassman, Atkins, Campos, and Nazareth).

Nancy M. Morris
Secretary

⁷² 15 U.S.C. 78s(b)(2).

⁷³ 15 U.S.C. 78k-1(b)(1).

⁷⁴ Id.