

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No 34-44442; File No. SR-PCX-01-03]

Self-Regulatory Organizations, Pacific Exchange, Inc.; Order Granting Approval To Proposed Rule Change To Permit an Officer or Director of a Facility of PCX Equities To Serve on the PCX Equities Board of Directors

June 18, 2001.

I. Introduction

On January 9, 2001, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the bylaws of its wholly-owned subsidiary, PCX Equities, Inc. ("PCXE" or "Corporation") to permit an officer or director of a facility to PCXE to serve on its Board of Director ("Board"). On February 20, 2001, PCX filed Amendment No. 1 to the proposal.³ The proposed rule change and Amendment No. 1 was published for comment in the *Federal Register* on March 7, 2001.⁴ The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

II. Description of the Proposal

In a related filing, PCX has proposed to create a new electronic trading facility of the PCXE called Archipelago Exchange.⁵ Under that proposal, Archipelago Exchange, L.L.C. ("Arca"), a subsidiary of Archipelago Holdings, L.L.C. ("Archipelago"), would operate as a facility of the PCXE pursuant to

Commission approval and various agreements between PCX, PCXE and Archipelago. In this proposal, the PCX proposes to amend the PCXE Bylaws to permit an officer or director of a facility of PCXE to serve on its Board. The proposed rule change would permit an Archipelago officer or director to serve on the PCXE Board.

Specifically, the proposed amendment to the bylaw states that "(a)n officer or director of a facility of the Corporation may serve on the Board of Directors." Although the proposal would permit an officer or director of a PCXE facility to serve on the PCXE Board, the proposal will not alter any of the PCXE Board composition or nomination requirements.⁶ The PCXE Board will continue to be comprised of fifty percent public directors (*i.e.*, not a broker or dealer in securities or affiliate thereof) and at least twenty percent of the directors (but no fewer than two directors) will be nominees of the ETP/Equity ASAP Nomination Committee. In addition, the PCXE Board will continue to consist of not less than ten or more than twelve directors.

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. The Commission finds that the proposed rule change is consistent with section 6(b) of the Act,⁷ in general, and furthers the objectives of section 6(b)(3),⁸ in particular, in that it is consistent with the fair representation principles set forth in the Act. Under section 6(b)(3) of the Act,⁹ the rules of an exchange must assure that its members are fairly represented in the selection of its directors and in the administration of its affairs.¹⁰ The fair representation requirement of section 6(b)(3)¹¹ allows statutory members to have a voice in an exchange's use of its self-regulatory authority. Moreover, this statutory requirement helps to ensure that members are protected from unfair, unfettered actions by an exchange pursuant to its rule, and that, in general, an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities.

The proposed rule change will allow an officer or a director of a facility of the Corporation to be on the PCXE Board, but will not alter the composition or nomination requirements for the PCXE Board that the Commission approved and found to be consistent with the Act in the order establishing the PCXE.¹² Under the proposal, the PCXE Board will continue to consist of fifty percent public directors¹³ and at least twenty percent of the directors (but no fewer than two directors) will be nominees of the ETP/Equity ASAP Nomination Committee. In addition, the PCXE Board will continue to consist of not less than ten or more than twelve directors. Presently, the PCXE Board consists of ten directors, however, the Exchange has represented that requirements set forth by the bylaws, rules and statutes will continue to be met whether the Board's size continues to be ten directors or is expanded to twelve directors. Thus, the PCXE Board will be structured in a manner that satisfies both the fair representation and public participation requirements of section 6(b)(3) of the Act.¹⁴

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,¹⁵ that the proposed rule change (SR-PCX-91-03) is approved. For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁶

Margaret H. McFarland,

Deputy Secretary.

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¹² Securities Exchange Act Release No. 34-42759 (May 5, 2000), 65 FR 30654 (May 12, 2000) ("PCXE Order").

¹³ The Commission has previously stated its belief that the inclusion of public, non-industry representatives on exchange oversight bodies is critical to make certain that an exchange activity works to protect the public interest in the exchange governance process. The Commission believes that public directors can provide unique, unbiased perspectives, which should enhance the ability of the PCXE Board to address issues in a nondiscriminatory fashion and foster the integrity of PCXE. See PCXE Order, *supra* note 12.

¹⁴ 15 U.S.C. 78f(b)(3).

¹⁵ 15 U.S.C. 78s(b)(2).

¹⁶ 17 CFR 200.30-3(a)(12).

¹⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Cindy L. Sink, Senior Attorney, Regulatory Policy, PCX, to Marc F. McKayle, Special Counsel, Division of Market Regulation, Commission, dated February 16, 2001 ("Amendment No. 1").

⁴ See Securities Exchange Act Release No. 34-44026 (Feb. 28, 2001), 66 FR 13822.

⁵ See Securities Exchange Act Release No. 34-43608 (Nov. 21, 2000), 65 FR 78822 (Dec. 15, 2000) (Notice of File No. SR-PCX-00-25 proposing to create a new electronic trading facility of the PCXE called Archipelago Exchange).

⁶ See Amendment No. 1 *supra* note 3.

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(3).

⁹ 15 U.S.C. 78f(b)(3).

¹⁰ In approving this rule, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation, 15 U.S.C. 78c(f).

¹¹ 15 U.S.C. 78f(b)(3).