

The Commission also notes that, even in the absence of these provisions of the Certificate of Incorporation, Section 20(a) of the Act<sup>67</sup> provides that any person with a controlling interest in New Arca Holdings would be jointly and severally liable with and to the same extent that New Arca Holdings is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Act<sup>68</sup> creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder, and Section 21C of the Act<sup>69</sup> authorizes the Commission to enter a cease-and-desist order against any person who has been "a cause of" a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.

The Commission believes that, taken together, these provisions are designed to facilitate the ability of the Commission to exercise appropriate oversight of the controlling persons of New Arca Holdings, and are consistent with the Act.

#### *E. Amendments to the Certificate of Incorporation and Bylaws of New Arca Holdings*

Section 19(b) of the Act<sup>70</sup> and Rule 19b-4 thereunder<sup>71</sup> require a self-regulatory organization ("SRO") to file proposed rule changes with the Commission. Although New Arca Holdings is not an SRO, certain provisions of its Certificate of Incorporation and Bylaws may be rules of an exchange<sup>72</sup> if they are the stated policies, practices, and interpretations, as defined in Rule 19b-4 of the Act, of the PCX. Any proposed rule or any proposed change in, addition to, or

prior to the consummation of the initial public offering to consent in writing to the applicability to them of such provisions, as applicable, prior to the consummation of the initial public offering. Article Eighteenth of the Certificate of Incorporation.

<sup>67</sup> 15 U.S.C. 78t(a).

<sup>68</sup> 15 U.S.C. 78t(e).

<sup>69</sup> 15 U.S.C. 78u-3.

<sup>70</sup> 15 U.S.C. 78s(b).

<sup>71</sup> 17 CFR 240.19b-4.

<sup>72</sup> Section 3(a)(27) of the Act, 15 U.S.C. 78c(a)(27), defines the rules of an exchange to be the constitution, articles of incorporation, bylaws, and rules, or instruments corresponding to the foregoing, of an exchange, and such stated policies, practices, or interpretations of such exchange as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules of such exchange.

deletion from the rules of an exchange must be filed pursuant to Section 19(b) of the Act and Rule 19b-4 thereunder.<sup>73</sup> Accordingly, PCX has filed the Certificate of Incorporation and the Bylaws of New Arca Holdings with the Commission.

#### **V. Accelerated Approval of Amendment No. 1**

Pursuant to Section 19(b)(2) of the Act,<sup>74</sup> the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice of filing thereof, unless the Commission finds good cause for so finding. The Commission hereby finds good cause for approving Amendment No. 1 to the proposed rule change prior to the thirtieth day after publishing notice of Amendment No. 1 in the **Federal Register** pursuant to Section 19(b)(2) of the Act.<sup>75</sup> Amendment No. 1 merely clarifies that, whenever the term "beneficial ownership" and any variation thereof is used in Article Four of the Certificate of Incorporation, the term has the same meaning as it has in Sections G and H of Article Four, and makes other technical corrections to the Certificate of Incorporation. Therefore, the Commission finds that good cause exists to accelerate approval of Amendment No. 1 to the proposed rule change, pursuant to Section 19(b)(2) of the Act.<sup>76</sup>

#### **VI. Conclusion**

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

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>77</sup> that the proposed rule change (SR-PCX-2004-56) is approved, and that Amendment No. 1 thereto is approved on an accelerated basis.

<sup>73</sup> Amendments to the Certificate of Incorporation and Bylaws of New Arca Holdings will be required to be submitted 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 Rule 19b-4 thereunder. Article Nineteen of the Certificate of Incorporation and Section 6.8(b) of the Bylaws of New Arca Holdings.

<sup>74</sup> 15 U.S.C. 78s(b)(2).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>78</sup>

**Margaret H. McFarland,**  
*Deputy Secretary.*

[FR Doc. 04-18637 Filed 8-13-04; 8:45 am]

BILLING CODE 8010-01-P

#### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-50171; File No. SR-PCX-2004-76]

#### **Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. To Impose Additional Obligations on the Exchange Should an Affiliate or Entity that Operates and/or Owns a Trading System or Facility of the Exchange List a Security on the Exchange**

August 9, 2004.

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 July 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") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On July 30, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons, and to grant accelerated approval to the proposed rule change, as amended.

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

The Exchange, through PCXE, is proposing to adopt a rule that would place additional reporting requirements on the Exchange should any affiliate of the Exchange or entity that operates and/or owns a trading system or facility of the Exchange list any security on the Exchange. The text of the proposed rule

<sup>78</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See letter from Steven B. Matlin, Senior Counsel, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated July 29, 2004 ("Amendment No. 1"). In Amendment No. 1, the Exchange made technical corrections to the text of the proposed rule change and corresponding changes to the Form 19b-4.

change, as amended, appears below. Proposed new language is in *italics*.

\* \* \* \* \*

## Rule 5

### Listings

#### General Provisions and Definitions

Rule 5.1(a)–(b)—No Change.

#### ***Listing of an Affiliate or Entity That Operates and/or Owns a Trading System or Facility of the Corporation***

Rule 5.1(c)—*If a security of an affiliate of the Corporation or any entity that operates and/or owns a trading system or facility of the Corporation is listed pursuant to the Rules of the Corporation, then the Corporation shall file a report each month with the Securities and Exchange Commission describing: (1) The Corporation's monitoring of such issuer's compliance with the Corporation's listing standards, including (i) the issuer's compliance with the Corporation's bid price requirement and (ii) the issuer's compliance with each of the quantitative and qualitative maintenance requirements; and (2) the Corporation's monitoring of the trading of the security, which shall include summaries of all related surveillance alerts, complaints, regulatory referrals, busted or adjusted trades, investigations, examinations, formal and informal disciplinary actions, exceptions reports, and the trading data. In addition, once a year, an independent accounting firm shall review the listing standards for the subject security to ensure that the issuer is in compliance with the Corporation's listing requirements, and a copy of the report shall be forwarded promptly to the Securities and Exchange Commission.*

*In the event the Corporation determines that the subject issuer is non-compliant with any listing standard, the Corporation shall file a report with the Securities and Exchange Commission at the same time the Corporation notifies the issuer of its non-compliance. The report shall identify the date of non-compliance, type of non-compliance, and any other material information conveyed to the issuer in the notice of non-compliance. Within five (5) business days of receipt of a plan of remediation from the issuer, the Corporation shall notify the Securities and Exchange Commission of such receipt, whether the plan of remediation was accepted by the Corporation and the time period*

*provided to regain compliance with the Corporation's listing standards.*

\* \* \* \* \*

## **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 III 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 proposing to add PCXE Rule 5.1(c) in order to place additional reporting requirements on the Exchange should any affiliate of the Exchange or entity that operates and/or owns a trading system or facility of the Exchange list its security on the Exchange. Specifically, if an affiliate or any entity that operates and/or owns a trading system or facility of the Exchange lists its security on the Exchange, then the Exchange would be required to file a monthly report with the Commission describing: (1) The Exchange's monitoring of the issuer's compliance with the Exchange's listing standards; and (2) the Exchange's monitoring of the trading of the security, including summaries of surveillance alerts, complaints, regulatory referrals, busted or adjusted trades, investigations, examinations, disciplinary actions, exception reports and trading data. In addition, once each year the Exchange would be required to have an independent accounting firm review the listing standards for the security of the affiliate or entity that operates and/or owns a trading system or facility of the Exchange to ensure that the issuer is in compliance with the listing requirements. A copy of the report shall be forwarded promptly to the Commission.

If the Exchange determines that the subject issuer is not in compliance with any of the Exchange's listing standards, then the Exchange would be required to notify the Commission of such non-compliance at the same time it notifies the issuer of the non-compliance. Furthermore, within five business days of receipt of a plan of remediation from the issuer, the Exchange would be

required to notify the Commission that: (1) It has received such plan; (2) whether the plan has been accepted by the Exchange; and (3) the time period by which the issuer believes it will regain compliance with the listing standards.

The Exchange believes that the addition of these requirements will help provide additional assurance that all securities listed on the Exchange are, and continue to be, in compliance with the Exchange's listing standards. In addition, the Exchange believes that the proposed rule, as amended, will help serve to minimize or eliminate any potential conflict of interest that may exist as a result of the listing on the Exchange of the security of an affiliate of the Exchange or entity that operates and/or owns a trading system or facility of the Exchange.

#### **2. Statutory Basis**

The Exchange believes that the proposed rule change is consistent with Section 6(b)<sup>4</sup> of the Act, in general, and furthers the objectives of Section 6(b)(5),<sup>5</sup> in particular, because it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments and perfect the mechanisms of a free and open market and 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. 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

<sup>4</sup> 15 U.S.C. 78f(b).

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

Number SR-PCX-2004-76 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-2004-76. 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-2004-76 and should be submitted on or before September 7, 2004.

#### IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful review, the Commission finds that 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.<sup>6</sup> In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,<sup>7</sup> which requires that the rules of an exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating

transactions in securities, and to remove impediments and perfect the mechanisms of a free and open market and to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission also finds that the proposed rule change, as amended, is consistent with Section 6(b)(1) of the Act,<sup>8</sup> which requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules or regulations thereunder, and the rules of the Exchange.

The listing of securities of an affiliate of the Exchange or any entity that operates and/or owns a trading system or facility of the Exchange could potentially create a conflict of interest between the Exchange's self regulatory responsibility to vigorously oversee the listing and trading of the stock on its market, and its own commercial or economic interests. Such "self-listing" may raise questions as to the Exchange's ability to independently and effectively enforce its rules against an affiliate or the operator/owner of its facility. In addition, such listing has the potential to exacerbate possible conflicts that may arise when the Exchange oversees competitors that may also be listed on the Exchange. The Commission believes that the proposed rule change, as amended, by requiring heightened reporting by the Exchange to the Commission with respect to the Exchange's oversight of the listing and trading on the Exchange of the securities of an affiliate or entity that operates and/or owns a trading system or facility of the Exchange, will help protect against any concern that the Exchange will not effectively enforce its rules with respect to the listing and trading of these securities. In addition, the requirement that an independent accounting firm review such issuer's compliance with the Exchange's listing standards adds a degree of independent oversight to the Exchange's regulation of the listing of these securities, which should help mitigate against any potential or actual conflicts of interest.

In addition, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>9</sup> for approving the proposed rule change and Amendment No. 1 prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Exchange notes in

its filing that Archipelago Holdings, L.L.C. ("Archipelago Holdings"), the operator of ArcaEx, the Exchange's equity trading facility, has filed a registration statement with the Commission to conduct a public offering of its common stock, and an application to list its common stock on the Exchange in the near future pursuant to the Exchange's current listing standards. The Exchange's current listing standards do not contain any provision relating specifically to the listing of the stock of an affiliate or the operator and/or owner of the facility of the Exchange. Accordingly, the Commission believes that granting accelerated approval of the proposed rule change and Amendment No. 1 to implement the additional listing requirements prior to the listing of the common stock of Archipelago Holdings is appropriate and consistent with Sections 6 and 19(b) of the Act.<sup>10</sup>

#### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>11</sup> that the proposed rule change and Amendment No. 1 (SR-PCX-2004-76), are hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

[FR Doc. 04-18639 Filed 8-13-04; 8:45 am]

**BILLING CODE 8010-01-P**

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## SMALL BUSINESS ADMINISTRATION

### [Declaration of Disaster #3605]

#### State of California

Los Angeles County and the contiguous counties of Kern, Orange, San Bernardino, and Ventura in the State of California constitute a disaster area as a result of a fire at the Mountain View Venture Apartments on July 18, 2004. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on October 5, 2004, and for economic injury until the close of business on May 5, 2005, at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 4 Office, P.O. Box 419004, Sacramento, CA 95841-9004.

The interest rates are:

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

<sup>11</sup> 15 U.S.C. 78s(b)(2).

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

<sup>6</sup> In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> 15 U.S.C. 78f(b)(1).

<sup>9</sup> 15 U.S.C. 78s(b)(2).