

*Paper Comments*

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-FICC-2005-20. 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, 100 F Street, NE., Washington, DC 20549. Copies of such filings also will be available for inspection and copying at the principal office of FICC and on FICC's Web site at <http://www.ficc.com>. 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-FICC-2005-20 and should be submitted on or before February 2, 2006.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

**Nancy M. Morris,**  
*Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-53073; File No. SR-NYSE-2005-77]

**Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3, 4 and 5 Relating to the Exchange's Business Combination with Archipelago Holdings, Inc.**

January 6, 2006.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, as amended, ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 3, 2005, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On December 1, 2005, the Exchange filed Amendment No. 1 to the proposed rule change. The Exchange filed Amendment No. 2 to the proposed rule change on December 12, 2005, and withdrew Amendment No. 2 on December 12, 2005. On December 12, 2005, the Exchange filed Amendment No. 3.<sup>3</sup> The Exchange filed Amendment No. 4 to the proposed rule change on December 21, 2005, and withdrew Amendment No. 4 on December 21, 2005. On December 21, 2005, the Exchange filed Amendment No. 5.<sup>4</sup>

The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Exchange is submitting this rule filing, as amended, ("Proposed Rule Change") in connection with its proposed merger ("Merger") with Archipelago Holdings, Inc., a Delaware corporation ("Archipelago"), as a result of which the businesses of the NYSE and Archipelago will be held under a single, publicly traded holding company named NYSE Group, Inc. ("NYSE Group"). Following the Merger, the NYSE's current businesses and assets will be held in three separate entities affiliated with NYSE Group—New York Stock Exchange LLC, NYSE Market, Inc.

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

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

<sup>3</sup> See Form 19b-4 dated December 12, 2005 ("Amendment No. 3"). Amendment No. 3 replaced Amendment No. 1 in its entirety.

<sup>4</sup> See Partial Amendment dated December 21, 2005 ("Amendment No. 5").

("NYSE Market"), and NYSE Regulation, Inc. ("NYSE Regulation").

To effect the Merger, the NYSE proposes that the organizational documents of NYSE Group and its subsidiaries as in effect immediately prior to the effective time of the Merger will be amended and restated. In addition, the NYSE proposes that New York Stock Exchange LLC, NYSE Regulation and NYSE Market will enter into a delegation agreement, and the Pacific Exchange, Inc. ("Pacific Exchange") and NYSE Regulation will enter into a regulatory services agreement ("Pacific Exchange Regulatory Services Agreement"). In addition, the NYSE proposes various amendments to its rules to reflect the Merger, which, after the Merger, will be the rules of New York Stock Exchange LLC. The Exchange states that the present Constitution of the NYSE will be eliminated and relevant provisions thereof will be included in the rules of New York Stock Exchange LLC.

The text of the Proposed Rule Change is available on the Exchange's Web site (<http://www.nyse.com>), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room. The text of Exhibits 5A through 5K of the Proposed Rule Change and Amendment No. 5 are also available on the Commission's Web site (<http://www.sec.gov/rules/sro.shtml>).

**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, as amended. 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 submitting the Proposed Rule Change to the Commission in connection with the Merger with Archipelago. Following the Merger, the businesses of the NYSE and Archipelago will be held under a single, publicly traded holding company named NYSE Group, a Delaware corporation. The Merger will occur pursuant to the terms of the Agreement and Plan of Merger, dated as of April 20,

<sup>14</sup> 17 CFR 200.30-3(a)(12).

2005, as amended and restated as of July 20, 2005 and as amended as of October 20, 2005 and as of November 2, 2005 (as amended from time to time, "Merger Agreement"), by and among the NYSE, Archipelago, NYSE Group, NYSE Merger Corporation Sub, Inc., a Delaware corporation and a wholly owned subsidiary of the NYSE, NYSE Merger Sub LLC, a New York limited liability company and a wholly owned subsidiary of NYSE Group, and Archipelago Merger Sub, Inc., a Delaware corporation and a wholly owned subsidiary of NYSE Group. The Merger is subject to approval of the NYSE members and Archipelago stockholders. The joint proxy statement/prospectus sent to the NYSE members and Archipelago stockholders in connection with their consideration of the Merger has been filed with the Commission.

The Merger will have the effect of "demutualizing" the NYSE because equity ownership in the NYSE will be separated from trading privileges on the NYSE. In the Merger, NYSE members will receive cash and/or shares of NYSE Group common stock. (Archipelago stockholders will receive solely shares of NYSE Group common stock.) After the Merger, trading privileges on the NYSE will be made available exclusively through trading licenses, as described in greater detail below.

The corporate structure and governance that the Proposed Rule Change affects seek to preserve and extend the functional separation, yet pervasive communication, achieved under the NYSE's comprehensive reforms to its governance architecture in 2003, and to insulate the NYSE's self-regulatory function from the additional cross-currents created by demutualization and public ownership.

In connection with the Merger, the NYSE proposes to engage in a reorganization ("Reorganization") so that immediately after the Merger, its businesses and assets are held in three separate entities:

1. *New York Stock Exchange LLC*. New York Stock Exchange LLC, a New York limited liability company, will be a wholly owned subsidiary of NYSE Group and will be the entity registered as a national securities exchange. After the Merger, New York Stock Exchange LLC is not expected to hold any assets other than all of the equity interests of NYSE Market and NYSE Regulation.

2. *NYSE Market, Inc.* NYSE Market, a Delaware corporation, will be a wholly owned subsidiary of New York Stock Exchange LLC. After the Merger, NYSE Market will hold all of the NYSE's current assets and liabilities other than

the New York Stock Exchange LLC's registration as a national securities exchange and other than the assets and liabilities relating to the regulatory functions currently conducted by the NYSE. NYSE Market will be the entity holding the assets and liabilities relating to the current securities exchange business of the NYSE.

3. *NYSE Regulation, Inc.* NYSE Regulation, a New York Type A not-for-profit corporation, will perform the regulatory responsibilities currently conducted by NYSE for New York Stock Exchange LLC and will contract to perform many of the regulatory functions of the Pacific Exchange for Archipelago. NYSE Regulation's sole member under the New York Not-for-Profit Corporation Law and thereby sole voting equity holder will be New York Stock Exchange LLC.<sup>5</sup>

Following the Merger, Archipelago will become a wholly owned subsidiary of NYSE Group; PCX Holdings, Inc., a Delaware corporation ("PCX Holdings"), will remain a wholly owned subsidiary of Archipelago; and the Pacific Exchange, a Delaware corporation, will remain a wholly owned subsidiary of PCX Holdings. Archipelago's businesses and assets will continue to be held by Archipelago and its subsidiaries. As noted above, pursuant to a services agreement, NYSE Regulation will perform many of the regulatory functions of the Pacific Exchange.

### **Purpose of the Merger and Reorganization**

The Merger will have the effect of (1) converting the NYSE from a not-for-profit entity into a for-profit entity (other than with respect to the regulatory responsibilities currently conducted by the NYSE, which will be separated into a not-for-profit entity), (2) demutualizing the NYSE by separating equity ownership in the NYSE from trading privileges on the NYSE, and (3) combining the businesses of the NYSE and Archipelago.

With the exception of NYSE Regulation, NYSE Group and its subsidiaries will be for-profit entities, rather than not-for-profit entities. The conversion from a not-for-profit entity to

a for-profit entity will increase the NYSE's capability to invest in its growth both internally and through acquisitions, and increase its focus on efficiency and cost reduction. Further, as a public, listed company, NYSE Group will have improved access to capital, and the ability to engage in future transactions using its stock as acquisition currency. The NYSE also expects that, after the Merger, NYSE Group will have much greater flexibility and ability to respond to competitive pressures than the NYSE's current membership structure permits. In addition, as a for-profit entity, NYSE Group will have an increased transparency and a sharper focus on costs, efficiency, and growth.

The combination of the businesses of the NYSE and Archipelago under a single holding company also has the advantage of creating a diversified business model for the combined company. The combination provides opportunities for cost savings by eliminating duplicative activities and realizing synergies between the business of Archipelago and the NYSE, while at the same time realizing revenue growth opportunities.

As part of the Reorganization, NYSE Regulation will be a separate, not-for-profit entity. The NYSE believes that NYSE Regulation's continued status as a not-for-profit entity will facilitate NYSE Group and its subsidiaries in managing conflicts between their business and regulatory objectives, maintaining regulatory standards and complying with the obligations of the exchange subsidiaries as registered national securities exchanges and self-regulatory organizations ("SROs").

### **Corporate Structure**

#### **NYSE Group**

Following the Merger, NYSE Group will be a for-profit, publicly traded stock corporation and will act as a holding company for the businesses of the NYSE and Archipelago. NYSE Group will hold all of the equity interests in New York Stock Exchange LLC and Archipelago.

#### *NYSE Group Board of Directors*

The NYSE Group board of directors will consist of a number of directors that will be fixed from time to time by the NYSE Group board of directors pursuant to a resolution adopted by a majority of the board of directors. It is currently contemplated that the NYSE Group board of directors will consist of at least 11 directors, one of whom will be the chief executive officer of NYSE Group.

The initial term of directors will end with the first annual stockholders

<sup>5</sup> The New York Not-for-Profit Corporation Law, under which NYSE Regulation is incorporated, uses the term "members" to describe those that have rights to distribution on liquidation and to elect the board of directors, analogous to the rights of stockholders as owners of a business corporation. New York Stock Exchange LLC will be the sole "member" of NYSE Regulation within the meaning of the New York Not-for-Profit Corporation Law, but this term should not be confused with the concept of a member or member organization of New York Stock Exchange LLC under its rules and for purposes of section 6 of the Act.

meeting to be held by NYSE Group. Thereafter, the directors will serve one-year terms. Nominees to the NYSE Group board of directors will be recommended by the nominating and governance committee of the NYSE Group board of directors. The nominating and governance committee will consider shareholder and public investor recommendations for candidates for the NYSE Group board of directors.

The NYSE Group board of directors will appoint the chairman of the board. The chairman may be, but need not be, the chief executive officer of NYSE Group. If the chairman is not the chief executive officer, then he or she must satisfy the board's independence criteria.<sup>6</sup> A director may serve for any number of terms, consecutive or otherwise. Directors need not be stockholders of NYSE Group.

Under section 3.2 of the proposed NYSE Group Bylaws, all members of the NYSE Group board of directors (other than the chief executive officer of NYSE Group) must satisfy the requirements for directors of NYSE Group for independence from management, member organizations and listed companies. The independent nature of the NYSE Group board of directors will be modeled after the current Commission-approved independence structure of the NYSE board of directors.<sup>7</sup> Specifically, each member of the NYSE Group board of directors, other than the chief executive officer of NYSE Group, will be required to be independent from (1) NYSE Group and its subsidiaries,<sup>8</sup> (2) any member organizations of New York Stock Exchange LLC or the Pacific Exchange,<sup>9</sup>

<sup>6</sup> The current NYSE Constitution provides that the positions of chairman of the board and chief executive officer of the NYSE may be, but need not be, held by the same person. The current chairman of the board of the NYSE is not the chief executive officer of the NYSE, and is therefore required to satisfy the same independence criteria applicable to the other independent members of the board. Under the current NYSE Constitution, if the chairman of the board is the chief executive officer, then such individual is not an independent director and cannot participate in executive sessions of the independent directors.

<sup>7</sup> See Securities Exchange Act Release No. 48946 (December 17, 2003), 68 FR 74678 (December 24, 2003).

<sup>8</sup> At the request of the Exchange, the Commission replaced "or its subsidiaries" with "and its subsidiaries." Telephone conversation between James F. Duffy, Senior Vice President and Deputy General Counsel, NYSE, et al., and Heather A. Seidel, Senior Special Counsel, Commission, Division of Market Regulation ("Division"), et al., on December 14, 2005 ("December 14 Telephone Conversation").

<sup>9</sup> This would include member organizations of New York Stock Exchange LLC and OTP Firms of the Pacific Exchange and ETP Holders of PCX Equities, Inc. or non-member broker-dealers that

and (3) any companies listed on New York Stock Exchange LLC or the Pacific Exchange. The independence policy of the NYSE Group board of directors applicable to elected members of the NYSE Group board of directors is part of the Proposed Rule Change. This policy mirrors the NYSE's current independence policy,<sup>10</sup> but has been expanded to cover relationships with the Pacific Exchange and its affiliates, and the member organizations and listed companies of the Pacific Exchange. It also removes the reference to lessor members, since there will be no such category after the Mergers, and no look-back is intended to disqualify individuals who were lessor members within the last three years.

#### *Committees of NYSE Group Board of Directors*

After the Merger, the NYSE Group board of directors may create one or more committees. It is expected that, upon completion of the Merger, the NYSE Group board of directors will initially have the following three committees: (1) An audit committee; (2) a human resource and compensation committee; and (3) a nominating and governance committee.

Each committee of the NYSE Group board of directors will consist solely of directors meeting the independence requirements of NYSE Group. As a result, the chief executive officer of NYSE Group will not be permitted to serve on any of these committees. The NYSE Group board of directors will review and adopt a charter for each of these committees annually.

#### *NYSE Group Management*

The officers of NYSE Group will manage the business and affairs of NYSE Group, subject to the oversight of the NYSE Group board of directors, and except as discussed below in relation to NYSE Regulation. The only member of the senior management team of NYSE Group who will also serve as a director of NYSE Group is the chief executive officer of NYSE Group. The chief executive officer of NYSE Regulation will attend, as appropriate, meetings of the board of directors of NYSE Group

engage in business involving substantial direct contact with securities customers, as well as members and allied members (as defined in paragraphs (a) and (c), respectively, of Rule 2 of New York Stock Exchange LLC), and OTP Holders and "allied persons" (as defined, respectively, in Rules 1.1(q) and 1.1(b) of the Pacific Exchange and Rule 1.1(c) of PCX Equities, Inc.).

<sup>10</sup> The NYSE's current independence policy was filed with and approved by the Commission. See Securities Exchange Act Release No. 51217 (February 16, 2005), 70 FR 9688 (February 28, 2005).

and its subsidiaries, and also will not be prohibited from meeting with management of NYSE Group and its subsidiaries. However, he or she will not be an officer or employee of any affiliated entity other than NYSE Regulation and will report solely to the NYSE Regulation board of directors.

#### *Voting and Ownership Limitations of NYSE Group Stock*

The proposed NYSE Group Certificate of Incorporation will place certain restrictions on the ability to vote and own shares of stock of NYSE Group.<sup>11</sup> Under the proposed Certificate of Incorporation of NYSE Group, no person (either alone or together with its related persons<sup>12</sup>) will be entitled to

<sup>11</sup> At the request of the Exchange, the Commission staff replaced the phrase "common stock" with "stock." Telephone conversation between James F. Duffy, Senior Vice President and Deputy General Counsel, NYSE, and Heather A. Seidel, Senior Special Counsel, Commission, Division, on January 3, 2006 ("January 3 Telephone Conversation").

<sup>12</sup> A "related person" means, with respect to any person: (i) Any "affiliate" of such person (as such term is defined in Rule 12b-2 under the Act); (ii) any other person(s) with which such first 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 NYSE Group; (iii) in the case of a person that is a company, corporation or similar entity, any executive officer (as defined under Rule 3b-7 under the Act) or director of such person and, in the case of a person that is a partnership or a limited liability company, any general partner, managing member or manager of such person, as applicable; (iv) in the case of a person that is a "member organization" (as defined in the rules of New York Stock Exchange LLC, as such rules may be in effect from time to time), any "member" (as defined in the rules of New York Stock Exchange LLC, as such rules may be in effect from time to time) that is associated with such person (as determined using the definition of "person associated with a member" as defined under section 3(a)(21) of the Act); (v) in the case of a person that is an OTP Firm, any OTP Holder that is associated with such person (as determined using the definition of "person associated with a member" as defined under section 3(a)(21) of the Act); (vi) in the case of a person that is a natural person, any relative or spouse of such natural person, or any relative of such spouse who has the same home as such natural person or who is a director or officer of NYSE Group or any of its parents or subsidiaries; (vii) in the case of a person that is an executive officer (as defined under Rule 3b-7 under the Act), or a director of a company, corporation or similar entity, such company, corporation or entity, as applicable; (viii) in the case of a person that is a general partner, managing member or manager of a partnership or limited liability company, such partnership or limited liability company, as applicable; (ix) in the case of a person that is a "member" (as defined in the rules of New York Stock Exchange LLC, as such rules may be in effect from time to time), the "member organization" (as defined in the rules of New York Stock Exchange LLC, as such rules may be in effect from time to time) with which such Person is associated (as determined using the definition of "person associated with a member" as defined under section 3(a)(21) of the Act); and (x) in the case of a person that is an OTP Holder, the OTP Firm with which such person is associated (as determined using the definition of "person

vote or cause the voting of shares of stock of NYSE Group 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. NYSE Group shall disregard any such votes purported to be cast in excess of this limitation.<sup>13</sup>

In addition, under the proposed NYSE Group Certificate of Incorporation, no person (either alone or together with its related persons) may at any time beneficially own shares of stock of NYSE Group representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter.<sup>14</sup>

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.

The NYSE Group board of directors will have the right to waive the provisions regarding voting and ownership limits applicable to any person by a resolution expressly permitting this voting or ownership (which resolution must be filed with and approved by the Commission under section 19 of the Act), subject to a determination by the NYSE Group board of directors that:

- The exercise of such voting rights or ownership, as applicable, will not impair the ability of either NYSE Group or any of New York Stock Exchange LLC, NYSE Market, NYSE Regulation, Archipelago Exchange, L.L.C. ("ArcaEx"), Pacific Exchange or PCX Equities, Inc. ("PCX Equities") (each, a

"Regulated Subsidiary" and together, the "Regulated Subsidiaries") to discharge their respective responsibilities under the Act and the rules and regulations thereunder and is otherwise in the best interests of NYSE Group, its stockholders and the Regulated Subsidiaries; and

- The exercise of such voting rights or ownership, as applicable, will not impair the Commission's ability to enforce the Act.<sup>15</sup>

In making these determinations, the NYSE Group board of directors may impose conditions and restrictions on the relevant stockholder or its related persons that it deems necessary, appropriate or desirable in furtherance of the objectives of the Act and its governance. Any such waiver would be tantamount to a proposed rule change subject to approval by the Commission. However, the NYSE Group board of directors may not waive the voting and ownership limits above the 20% threshold for any person if such person or its related persons is:

- For so long as NYSE Group directly or indirectly controls the New York Stock Exchange LLC or NYSE Market, a "member" or "member organization" (as defined in the rules of New York Stock Exchange LLC, as such rules may be in effect from time to time);

- For so long as NYSE Group directly or indirectly controls the Pacific Exchange, PCX Equities or any facility of the Pacific Exchange, an ETP Holder (as defined in the PCX Equities rules of the Pacific Exchange), an OTP Holder or an OTP Firm (each as defined in the rules of Pacific Exchange); or

- Subject to any statutory disqualification (as defined in section 3(a)(39) of the Act).

The proposed NYSE Group Certificate of Incorporation will also require any stockholder that the NYSE Group board of directors reasonably believes to be subject to the voting or ownership restrictions summarized above, and any person (either alone or together with its related persons) that at any time beneficially owns 5% or more of NYSE Group's outstanding capital stock (which ownership has not been reported to NYSE Group), to provide to NYSE Group, upon the request of the NYSE Group board of directors, complete information as to all shares of capital stock of NYSE Group beneficially owned by such person and its related persons, and any other factual matters relating to the applicability or effect of the voting and ownership limitations outlined above as may be reasonably

requested of such person and its related persons.<sup>16</sup>

#### *Protection of Self-Regulatory Functions and Oversight*

The proposed NYSE Group Certificate of Incorporation will contain several other provisions designed to protect the independence of the self-regulatory function of the Regulated Subsidiaries.

The proposed NYSE Group Certificate of Incorporation requires that, in discharging his or her responsibilities as a member of the board, each director of NYSE Group must, to the fullest extent permitted by applicable law, take into consideration the effect that NYSE Group's actions would have on the ability of the Regulated Subsidiaries to carry out their responsibilities under the Act and on the ability of the Regulated Subsidiaries and NYSE Group:

- To engage in conduct that fosters and does not interfere with the Regulated Subsidiaries' and NYSE Group's ability to prevent fraudulent and manipulative acts and practices in the securities markets;
- To promote just and equitable principles of trade in the securities markets;
- 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 in securities and a national securities market system; and
- In general, to protect investors and the public interest.<sup>17</sup>

The proposed NYSE Group Certificate of Incorporation provides that, to the fullest extent permitted by applicable law, all confidential information pertaining to the self-regulatory function of the New York Stock Exchange LLC, NYSE Market, NYSE Regulation, Pacific Exchange and PCX Equities (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of any of the Regulated Subsidiaries that shall come into the possession of NYSE Group shall:

- Not be made available to any persons other than to those officers, directors, employees and agents of NYSE Group that have a reasonable need to know the contents thereof;
- Be retained in confidence by NYSE Group and its officers, directors, employees and agents; and

associated with a member" as defined under section 3(a)(21) of the Act). See proposed NYSE Group Certificate of Incorporation, Article V, section 1(E).

<sup>13</sup> See proposed NYSE Group Certificate of Incorporation, Article V, section 1(A).

<sup>14</sup> See proposed NYSE Group Certificate of Incorporation, Article V, section 2(A).

<sup>15</sup> See proposed NYSE Group Certificate of Incorporation, Article V, sections 1(A) and 2(C).

<sup>16</sup> See proposed NYSE Group Certificate of Incorporation, Article V, section 4.

<sup>17</sup> See proposed NYSE Group Certificate of Incorporation, Article VI, section 8.

• Not be used for any commercial purposes.<sup>18</sup>

Notwithstanding the foregoing, nothing in the NYSE Group Certificate of Incorporation shall be interpreted so as to limit or impede the rights of the Commission or any of the Regulated Subsidiaries to access and examine such confidential information pursuant to the Federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any officers, directors, employees or agents of NYSE Group to disclose such confidential information to the Commission or the Regulated Subsidiaries.<sup>19</sup> NYSE Group's books and records shall be subject at all times to inspection and copying by (a) the Commission and (b) any Regulated Subsidiary; provided that, in the case of (b), such books and records are related to the operation or administration of such Regulated Subsidiary or any other Regulated Subsidiary over which such Regulated Subsidiary has regulatory authority or oversight. NYSE Group's books and records related to Regulated Subsidiaries shall be maintained within the United States. In addition, for so long as NYSE Group directly or indirectly controls any Regulated Subsidiary, the books, records, premises, officers, directors and employees of NYSE Group shall be deemed to be the books, records, premises, officers, directors and employees of the Regulated Subsidiaries for purposes of and subject to oversight pursuant to the Act.<sup>20</sup>

The proposed NYSE Group Certificate of Incorporation provides that NYSE Group shall comply with the Federal securities laws and the rules and regulations thereunder and shall cooperate with the Commission and the Regulated Subsidiaries pursuant to and to the extent of their respective regulatory authority, and shall take reasonable steps necessary to cause its agents to cooperate with the Commission and, where applicable, the Regulated Subsidiaries pursuant to their regulatory authority.<sup>21</sup>

The proposed NYSE Group Certificate of Incorporation also provides that NYSE Group, 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 jurisdiction of the U.S. Federal

courts and the Commission for the purposes of any suit, action or proceeding pursuant to the U.S. Federal securities laws, and the rules and regulations thereunder, commenced or initiated by the Commission arising out of, or relating to, the activities of the Regulated Subsidiaries (and shall be deemed to agree that NYSE Group may serve as U.S. agent for purposes of service of process in such suit, action or proceeding). Further, NYSE Group, as well as each such director, officer or employee by virtue of acceptance of 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>22</sup> Moreover, the proposed NYSE Group Certificate of Incorporation provides that each director, officer and employee of NYSE Group, in discharging his or her responsibilities in such capacity, shall (1) comply with the Federal securities laws and the rules and regulations thereunder, (2) cooperate with the Commission, and (3) cooperate with the Regulated Subsidiaries pursuant to their regulatory authority.<sup>23</sup>

The proposed NYSE Group Certificate of Incorporation provides that, for so long as NYSE Group shall control, directly or indirectly, any of the Regulated Subsidiaries, before any amendment to the NYSE Group Certificate of Incorporation shall be effective, such amendment shall be submitted to the boards of directors of the New York Stock Exchange LLC, NYSE Market, NYSE Regulation, Pacific Exchange and PCX Equities, and if any or all of such boards of directors determines that the amendment must be filed with or filed with and approved by the Commission under section 19 of the Act, then such amendment shall not be effectuated until filed with or filed with and approved by the Commission.<sup>24</sup>

In addition, the proposed Certificate of Incorporation of NYSE Group provides that NYSE Group, its directors, officers and employees shall give due regard to the preservation of the independence of the self-regulatory

function of the Regulated Subsidiaries (to the extent of each Regulated Subsidiary's self-regulatory function) and to obligations to investors and the general public and shall not take any actions that would interfere with the effectuation of any decisions by the board of directors or managers of the Regulated Subsidiaries relating to their regulatory functions (including disciplinary matters) or that would interfere with the ability of the Regulated Subsidiaries to carry out their respective responsibilities under the Act.<sup>25</sup>

Under the proposed NYSE Group Certificate of Incorporation, NYSE Group 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, of NYSE Group to consent in writing to the applicability to them of certain of these provisions with respect to their activities related to any Regulated Subsidiary.<sup>26</sup>

The NYSE does not currently, nor after the Merger will it, own or control any of its member organizations. To the extent that a member organization is the owner of NYSE Group common stock, the ownership limitations described above are intended to deal with the issues that might otherwise be presented. However, the NYSE understands that the Commission is also concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interests that could exist if an exchange were to become affiliated with one of its members, as well as the potential for unfair competitive advantage that the affiliated member could have by virtue of informational or operational advantages, or the ability to receive preferential treatment.<sup>27</sup> The NYSE acknowledges that ownership of, or a control relationship with, a member organization by NYSE Group or any of its subsidiaries would necessitate that the foregoing concerns be first addressed with, and to the satisfaction of, the Commission.<sup>28</sup>

<sup>25</sup> See proposed NYSE Group Certificate of Incorporation, Article XII.

<sup>26</sup> See proposed NYSE Group Certificate of Incorporation, Article XII.

<sup>27</sup> See Securities Exchange Act Release No. 52497 (September 22, 2005), 70 FR 56949 (September 29, 2005).

<sup>28</sup> See proposed Rule 2B. The Exchange notes that the Commission has specifically approved the ownership and operation of the outbound router function of Archipelago Securities by Archipelago, subject to the conditions specified in Securities Exchange Act Release No. 52497. See *supra* note 27.

<sup>18</sup> See proposed NYSE Group Certificate of Incorporation, Article XI.

<sup>19</sup> See proposed NYSE Group Certificate of Incorporation, Article XI.

<sup>20</sup> See proposed NYSE Group Certificate of Incorporation, Article XI.

<sup>21</sup> See proposed NYSE Group Certificate of Incorporation, Article XII.

<sup>22</sup> See proposed NYSE Group Certificate of Incorporation, Article X.

<sup>23</sup> See proposed NYSE Group Certificate of Incorporation, Article VI, section 8.

<sup>24</sup> See proposed NYSE Group Certificate of Incorporation, Article XIII.

### New York Stock Exchange LLC

As proposed, after the Merger, New York Stock Exchange LLC will succeed to the registration of the NYSE as a national securities exchange under the Act. It will be a direct, wholly owned subsidiary of NYSE Group and the parent company of NYSE Market and NYSE Regulation. It will not hold any material assets other than the equity interests in NYSE Market and NYSE Regulation. Pursuant to the proposed delegation agreement by and among New York Stock Exchange LLC, NYSE Market and NYSE Regulation (“NYSE Delegation Agreement”) (described below), the market functions of New York Stock Exchange LLC will be delegated to NYSE Market and the regulatory functions of New York Stock Exchange LLC will be delegated to NYSE Regulation.<sup>29</sup>

#### *New York Stock Exchange LLC Board of Directors*

The New York Stock Exchange LLC board of directors will consist of a number of directors as determined by NYSE Group, as the sole equity owner, from time to time; provided that (1) all of the independent directors of the NYSE Group (“NYSE Group Independent Directors”) shall be directors of New York Stock Exchange LLC, and (2) at least twenty percent (20%), and not less than two, of the directors of New York Stock Exchange LLC will be persons who are not NYSE Group directors,<sup>30</sup> but who otherwise qualify as independent under the independence policy of the NYSE Group board of directors (“Non-Affiliated LLC Directors”).

#### *Committees of New York Stock Exchange LLC Board of Directors*

The board of directors of New York Stock Exchange LLC is not expected to have its own committees. Rather, it is expected that any necessary functions

<sup>29</sup> NYSE Market’s responsibilities include the operation of Market Watch, a unit whose functions include, among others, coordination with listed companies, floor officials, and regulatory staff of NYSE Regulation with respect to dissemination of news and trading halts. This unit is distinguished from the Stock Watch unit within NYSE Regulation, whose functions include review of exception reports, alerts and investigations. NYSE Market will establish the principles and policies under which trading on NYSE Market will be conducted, and those principles and policies will be codified by NYSE Regulation in the rules of New York Stock Exchange LLC. In addition, NYSE Market will be responsible for referring to NYSE Regulation, for investigation and action as appropriate, any possible rule violations that come to its attention.

<sup>30</sup> At the request of the Exchange, the Commission staff replaced “directors” with “persons” to match the language in the proposed Operating Agreement of New York Stock Exchange LLC. December 14 Telephone Conversation.

with respect to audit, compensation, nomination and governance will be performed by the relevant committees of the NYSE Group board of directors.

#### *Appointment of Non-Affiliated LLC Directors*

NYSE Group, as the sole equity owner of New York Stock Exchange LLC, shall appoint or elect as the Non-Affiliated LLC Directors the candidates nominated by the nominating and governance committee of the NYSE Group board of directors (such candidates, “Non-Affiliated LLC Director Candidates”).

The nominating and governance committee of the NYSE Group board of directors shall be obligated to designate as Non-Affiliated LLC Director Candidates those Fair Representation Candidates (as hereinafter defined) who are recommended jointly by the director candidate recommendation committee of NYSE Market (which committee is described below) and the director candidate recommendation committee of NYSE Regulation (which committee is described below), including those who emerge from the petition process of New York Stock Exchange members, all as described below under “Fair Representation of Members.”

#### *New York Stock Exchange LLC Management*

The officers of New York Stock Exchange LLC will be appointed by the New York Stock Exchange LLC board of directors as it deems appropriate.

#### **NYSE Market, Inc.**

NYSE Market will be a wholly owned subsidiary of New York Stock Exchange LLC. NYSE Market will hold all of NYSE’s current assets and liabilities other than the registration as a national securities exchange and other than the assets and liabilities relating to the regulatory functions currently conducted by the NYSE, which will be held by NYSE Regulation. After the Merger, NYSE Market will conduct the exchange business that is currently conducted by the NYSE pursuant to the NYSE Delegation Agreement (described below), including the issuance of licenses to trade on NYSE Market (“Trading Licenses”), which such Trading Licenses are described in greater detail below.

#### *NYSE Market Board of Directors*

The NYSE Market board of directors will consist of a number of directors as determined from time to time by New York Stock Exchange LLC (as the sole stockholder of NYSE Market); *provided that*: (1) The chief executive officer of NYSE Group will be a director of NYSE

Market; (2) a majority of the directors of NYSE Market will be NYSE Group Independent Directors; and (3) at least twenty percent (20%), and not less than two, of the NYSE Market directors will be persons<sup>31</sup> who are not NYSE Group directors (“Non-Affiliated Market Directors”).<sup>32</sup> The Non-Affiliated Market Directors need not be independent, and must meet any status or constituent affiliation qualifications prescribed by NYSE Market rule or policy filed with the Commission.

#### *Committees of NYSE Market Board of Directors*

The NYSE Market board of directors may create one or more committees comprised of NYSE Market directors. It is expected that the committees of the NYSE Group board of directors will perform the board committee functions relating to audit, governance and compensation. The NYSE Market board of directors may also create committees comprised in whole or in part of individuals who are not directors.

Upon completion of the Merger, the NYSE Market board of directors will establish one or more advisory committees. The advisory committees will facilitate communication and provide input to the board of directors, management, and staff of NYSE Market and its affiliated entities on policies, programs, products and services to further strengthen the ability of NYSE Market and its affiliated entities to better serve their customers.

In addition, a Market Performance Committee and an Allocation Committee will be created by the board of directors of NYSE Market containing representatives of member organizations. These committees will have responsibilities specified in certain Exchange rules (see, for example, proposed NYSE Rule 20(b) and NYSE Rules 103A and 103B).

On an annual basis, the NYSE Market board of directors will appoint a director candidate recommendation committee (“NYSE Market DCRC”) comprised of representatives of upstairs firms, specialists and floor brokers. The NYSE Market DCRC will be responsible for recommending to the nominating and governance committee of the NYSE

<sup>31</sup> At the request of the Exchange, the Commission staff replaced “directors” with “persons” to match the language in the proposed Bylaws of NYSE Market. December 14 Telephone Conversation.

<sup>32</sup> Note that the reference to “at least 20%, and not less than two” is keyed into the requirements outlined in the “Fair Representation of Members” section below. There may in fact be more Non-Affiliated Market Directors, but they would not be subject to the selection, recommendation and petition procedures described in the “Fair Representation of Members” section.

Group board of directors Fair Representation Candidates for the Non-Affiliated Market Directors.

#### *Appointment of Non-Affiliated Market Directors*

New York Stock Exchange LLC, as the sole stockholder of NYSE Market, will appoint or elect as the Non-Affiliated Market Directors the candidates nominated by the nominating and governance committee of the NYSE Group board of directors (such candidates, "Non-Affiliated Market Director Candidates").

The nominating and governance committee of the NYSE Group board of directors shall be obligated to designate as Non-Affiliated Market Director Candidates those Fair Representation Candidates who are recommended by the NYSE Market DCRC, including those who emerge from the petition process of New York Stock Exchange members, all as described below under "Fair Representation of Members."

#### *NYSE Market Management*

The officers of NYSE Market will manage the business and affairs of NYSE Market, subject to the oversight of the NYSE Market board of directors, and except as discussed below in relation to NYSE Regulation. The chief executive officer of NYSE Group will serve as the chief executive officer of NYSE Market and will also serve as a director of NYSE Market.

#### **NYSE Regulation, Inc.**

As noted above, New York Stock Exchange LLC will be the sole voting equity holder of NYSE Regulation. NYSE Regulation will hold all of the assets and liabilities held by the NYSE prior to the Merger related to the regulatory functions conducted by the NYSE prior to the Merger. After the Merger, NYSE Regulation will be responsible for the regulatory functions of New York Stock Exchange LLC pursuant to the NYSE Delegation Agreement (described below), as well as many of the regulatory functions of the Pacific Exchange pursuant to the Pacific Exchange Regulatory Services Agreement.

#### *NYSE Regulation Board of Directors*

The NYSE Regulation board of directors will consist of a number of directors as determined from time to time by New York Stock Exchange LLC (as the sole equity holder of NYSE Regulation); *provided that*: (1) The chief executive officer of NYSE Regulation will be a director of NYSE Regulation; (2) a majority of the NYSE Regulation directors will be NYSE Group

Independent Directors; and (3) at least twenty percent (20%), and not less than two, of the NYSE Regulation directors will be persons<sup>33</sup> who are not NYSE Group directors, but who otherwise qualify as independent under the independence policy of the NYSE Group board of directors ("Non-Affiliated Regulation Directors").<sup>34</sup>

#### *Committees of the NYSE Regulation Board of Directors*

The NYSE Regulation board of directors may create one or more committees comprised of NYSE Regulation directors. It will create a nominating and governance committee, which will be comprised of a majority of NYSE Group Independent Directors and at least two Non-Affiliated Regulation Directors. It is expected that the committees of the NYSE Group board of directors will perform the board committee functions relating to audit and compensation. With due regard to the independence of NYSE Regulation, compensation for NYSE Regulation will be determined in consultation with the NYSE Regulation directors. This is similar to the interplay between the compensation committee and the regulatory oversight committee of the NYSE that exists today.

The NYSE Regulation board of directors may also create committees comprised in whole or in part of individuals who are not directors. For example, the NYSE Regulation board of directors will appoint a Committee for Review that will, among other things, review disciplinary decisions on behalf of the NYSE Regulation board of directors. This committee will be comprised of both directors of NYSE Regulation that satisfy the independence requirements for directors of NYSE Regulation, as well as persons who are not directors; *provided, however*, that a majority of the members of the committee voting on a matter subject to a vote of the committee will be directors of NYSE Regulation. Among the persons on the committee who are not directors, there will be included representatives of each of (a) upstairs firms, (b) specialists, and (c) floor brokers. The Exchange Rules are proposed to be amended to reflect the

ability of such committee members and Executive Floor Governors<sup>35</sup> to require review by the board of New York Stock Exchange LLC of disciplinary decisions pursuant to NYSE Rules 476 and 476A, acceptability committee decisions pursuant to NYSE Rule 308, and decisions resulting from summary proceedings pursuant to NYSE Rule 475.

In addition, a regulatory advisory committee will be created by the NYSE Regulation board of directors and will include representatives of member organizations. This committee will have responsibilities specified in proposed NYSE Rule 20(b).

Upon completion of the Merger, the NYSE Regulation board of directors is expected to establish one or more additional advisory committees. The advisory committees will facilitate communication and provide input to the board of directors, management, and staff of NYSE Regulation and its affiliated entities on policies, programs, regulatory aspects of products and services to further strengthen the ability of NYSE Regulation and its affiliated entities to better serve its regulatory responsibilities.

On an annual basis, the NYSE Regulation board of directors will appoint a director candidate recommendation committee ("NYSE Regulation DCRC") comprised of representatives of each of (a) upstairs firms, (b) specialists, and (c) floor brokers. The NYSE Regulation DCRC will be responsible for recommending to the nominating and governance committee of the NYSE Regulation board of directors Fair Representation Candidates for the Non-Affiliated Regulation Directors.

#### *Appointment of Non-Affiliated Regulation Directors*

New York Stock Exchange LLC, as the sole equity owner of NYSE Regulation, will appoint or elect as the Non-Affiliated Regulation Directors the candidates nominated by the nominating and governance committee of NYSE Regulation (such candidates, "Non-Affiliated Regulation Director Candidates").

The nominating and governance committee of NYSE Regulation shall be obligated to designate as Non-Affiliated Regulation Director Candidates those Fair Representation Candidates who are recommended by the NYSE Regulation DCRC, including those who emerge from the petition process of New York Stock Exchange members, all as

<sup>33</sup> At the request of the Exchange, the Commission staff replaced "directors" with "persons" to match the language in the proposed Bylaws of NYSE Regulation. December 14 Telephone Conversation.

<sup>34</sup> Note that the reference to "at least 20%, and not less than two" is keyed into the requirements outlined in the "Fair Representation of Members" section below. There may in fact be more Non-Affiliated Regulation Directors, but they would not be subject to the selection, recommendation and petition procedures described in the "Fair Representation of Members" section.

<sup>35</sup> See proposed NYSE Rule 46A.

described below under "Fair Representation of Members."

#### *NYSE Regulation Management*

The officers of NYSE Regulation will manage the affairs of NYSE Regulation, subject to the oversight of the NYSE Regulation board of directors. The chief executive officer of NYSE Regulation will attend as appropriate meetings of the board of directors of NYSE Group and its subsidiaries, and also will not be prohibited from meeting with management of NYSE Group and its subsidiaries. However, he or she will not be an officer or employee of any affiliated entity other than NYSE Regulation and will report solely to the NYSE Regulation board of directors.

#### **Archipelago Holdings, Inc.**

Through the Merger, Archipelago will become a wholly owned subsidiary of NYSE Group. The governing documents of Archipelago will remain unchanged other than amendments required to permit NYSE Group to own all of the outstanding shares of Archipelago. These amendments will be proposed in a separate application on Form 19b-4 to be filed by the Pacific Exchange.

#### **PCX Holdings, Inc.**

PCX Holdings will remain a wholly owned subsidiary of Archipelago after the Merger, and the Proposed Rule Change will not affect its governing documents or operations.

#### **Pacific Exchange, Inc. and PCX Equities, Inc.**

The Pacific Exchange will remain a wholly owned subsidiary of PCX Holdings and will maintain its status as a registered national securities exchange and an SRO. Its operations will remain unchanged except with regard to its regulatory responsibilities, many of which will be performed by NYSE Regulation after the Merger.

PCX Equities will remain a wholly owned subsidiary of the Pacific Exchange. Its operations will remain unchanged except with regard to its regulatory responsibilities, many of which will be performed by NYSE Regulation after the Merger.

#### **New York Stock Exchange Membership**

After the Merger, there will continue to be "members" and "member organizations" of the New York Stock Exchange. Such members or member organizations (and new applicants), however, will not, by virtue of their membership, be equity owners of NYSE Group or any of its subsidiaries. Instead, after the Merger, such members and member organizations will be

comprised of: (1) Organizations that obtain Trading Licenses in accordance with the rules of New York Stock Exchange LLC (including the rules of eligibility that will apply to those who wish to be a member or member organization); and (2) broker-dealers that agree to submit to the jurisdiction and rules of New York Stock Exchange LLC, without obtaining a Trading License and thus without having rights to directly access the trading facilities of NYSE Market.<sup>36</sup> After the Merger, NYSE Market may decide to issue separate licenses for electronic-only access or access limited to particular products. Such decisions would be implemented only following any required rule changes filed with and approved by the Commission.

#### **Fair Representation of Members**

To ensure fair representation of New York Stock Exchange members in the selection of directors and the administration of the affairs of New York Stock Exchange LLC after the Mergers,<sup>37</sup> twenty percent (20%), and not less than two, of the directors on the boards of directors of each of New York Stock Exchange LLC, NYSE Market and NYSE Regulation will be persons who are not NYSE Group directors, and will be chosen solely from candidates (referred to herein as "Fair Representation Candidates") who are recommended by the NYSE Market DCRC and/or NYSE Regulation DCRC, as applicable, including those who may emerge from the petition process described below in this section, to fill positions as non-affiliated directors on the boards of New York Stock Exchange LLC, NYSE Market and NYSE Regulation, respectively.

New York Stock Exchange LLC members will also have the right to propose Fair Representation Candidates by petition. The petition process will work as follows:

<sup>36</sup> Proposed NYSE Rule 2(a) defines the term "member," when used to denote a natural person approved by the Exchange, as meaning a natural person associated with a member organization who has been approved by the Exchange and designated by such member organization to effect transactions on the floor of the Exchange or any facility thereof.

<sup>37</sup> See section 6(b)(3) of the Act. In nominating candidates that will serve on the boards of New York Stock Exchange LLC, NYSE Market and NYSE Regulation, the nominating and governance committees of NYSE Group and NYSE Regulation respectively will include at least one person intended to allow each such board to meet the requirements of section 6(b)(3) of the Act concerning issuers and at least one person intended to allow each such board to meet the requirements of section 6(b)(3) of the Act concerning investors. At the request of the Exchange, the Commission staff modified the language of this footnote to clarify its meaning. December 14 Telephone Conversation.

Candidates put forward by the NYSE Market DCRC and/or NYSE Regulation DCRC, as applicable, to be Fair Representation Candidates will be announced to the member organizations of New York Stock Exchange on a date in each year ("Announcement Date") sufficient to accommodate the process for the proposal of alternate nominees by petition. Following the Announcement Date, and subject to the limitations described below, a person shall be a petition candidate if a properly completed petition shall be completed and such person shall be endorsed by a number of votes equal to at least ten percent (10%) of the votes eligible to be cast for such candidate as described below. For purposes of determining whether a person has been endorsed by the requisite ten percent (10%) of votes to be a petition candidate, the votes eligible to be cast shall be as follows:

- For purposes of a candidate for the New York Stock Exchange LLC board of directors or the NYSE Regulation board of directors, each member organization in good standing shall be entitled to one vote for each trading license owned by it, and each member organization in good standing that does not own a trading license shall be entitled to one vote;

- For purposes of a candidate for the NYSE Market board of directors, each member organization in good standing shall be entitled to one vote for each trading license owned by it (and member organizations that do not own a trading license shall not be entitled to vote);

*provided, however*, that, in each case, no member organization, either alone or together with its affiliates (as defined under Rule 12b-2 under the Act), may account for more than fifty percent (50%) of the votes endorsing a particular petition candidate, and any votes cast by such member organization, either alone or together with its affiliates, in excess of such fifty percent (50%) limitation shall be disregarded.

Each petition must include for each potential Fair Representation Candidate a completed questionnaire used to gather information concerning non-affiliated director candidates for the relevant entity (the form of questionnaire will be provided upon the request of any member organization). The petitions must be filed within two weeks after the Announcement Date. The nominating and governance committee of the NYSE Group board of directors (with respect to candidates for New York Stock Exchange LLC and NYSE Market), and the nominating and

governance committee of the NYSE Regulation board of directors (with respect to NYSE Regulation) will determine whether the persons proposed by petition are eligible for election to the position for which they are to be nominated, and such determinations will be final and conclusive. Those to be nominated for the New York Stock Exchange LLC or NYSE Regulation board of directors must qualify as independent under the independence policy of the NYSE Group board of directors. Those to be nominated for a position on the NYSE Market board must meet any applicable constituent status qualifications that have been prescribed for such directors by rule or policy filed with the Commission. All nominees must be free of any statutory disqualification (as defined in section 3(a)(39) of the Act).

If the sum of the number of candidates recommended by the NYSE Market DCRC and/or the NYSE Regulation DCRC, as applicable, and the number of petition candidates exceeds the number of available Fair Representation Candidate positions for New York Stock Exchange LLC, NYSE Market or NYSE Regulation, as applicable, all such candidates shall be submitted to the member organizations for a vote. The candidates receiving the highest number of votes for the available Fair Representation Candidate positions shall be the Fair Representation Candidates recommended to the nominating and governance committee of the board of directors of NYSE Group or NYSE Regulation, as applicable. The member organizations will be afforded a confidential voting procedure and will be given no less than 20 business days to submit their votes. For purposes of determining which candidates received the highest number of votes and therefore should be the Fair Representation Candidates recommended to the applicable nominating and governance committee, the votes eligible to be cast shall be as follows:

- For purposes of a candidate for the New York Stock Exchange LLC board of directors or the NYSE Regulation board of directors, each member organization in good standing shall be entitled to one vote for each trading license owned by it, and each member organization in good standing that does not own a trading license shall be entitled to one vote;

- For purposes of a candidate for the NYSE Market board of directors, each member organization in good standing shall be entitled to one vote for each trading license owned by it (and member organizations that do not own

a trading license shall not be entitled to vote);

*provided, however*, that, in each case, no member organization, either alone or together with its affiliates, may account for more than twenty percent (20%) of the votes endorsing a particular petition candidate, and any votes cast by such member organization, either alone or together with its affiliates, in excess of such twenty percent (20%) limitation shall be disregarded.

#### **Listing of NYSE Group Common Stock on NYSE Market**

##### *Initial Listing*

NYSE Group intends to list its shares of common stock for trading on New York Stock Exchange LLC. Pursuant to proposed NYSE Rule 497(b), any security of NYSE Group or its affiliates shall not be approved for listing on New York Stock Exchange LLC unless NYSE Regulation finds that such securities satisfy New York Stock Exchange LLC's rules for listing, and such finding is approved by the NYSE Regulation board of directors. As proposed NYSE Rule 497 will not be in effect, the Merger will not have closed and the NYSE Regulation board of directors will not have been constituted as contemplated herein prior to the time by which the initial listing of the NYSE Group common stock must be approved, that listing will be reviewed by the regulatory staff of NYSE and approved by the Regulatory Oversight Committee of the current board of directors of NYSE, as the most logical predecessor to the NYSE Regulation board.<sup>38</sup>

##### *Continued Listing and Trading*

NYSE Regulation will be responsible for all listing compliance decisions with respect to NYSE Group as an issuer. NYSE Regulation will prepare a quarterly report summarizing its monitoring of NYSE Group common stock's compliance with listing standards and trading rules as described in proposed NYSE Rule 497(c).<sup>39</sup> This report will be provided to the NYSE Regulation board of directors and a copy will be forwarded promptly to the Commission. Once a year an independent accounting firm will review NYSE Group's compliance with the listing standards and a copy of its

<sup>38</sup> This process is not included in the text of proposed NYSE Rule 497. The Exchange has represented that it will amend proposed NYSE Rule 497 to include this procedure prior to any Commission approval of the Proposed Rule Change. December 14 Telephone Conversation.

<sup>39</sup> At the request of the Exchange, the Commission staff edited this statement to match the language in proposed NYSE Rule 497. December 14 Telephone Conversation.

report will be forwarded promptly to the Commission. If NYSE Regulation determines that NYSE Group common stock is not in compliance with any applicable listing standard, NYSE Regulation shall notify NYSE Group promptly and request a plan for compliance. Within five business days<sup>40</sup> of providing such notice to NYSE Group, NYSE Regulation shall file a report with the Commission identifying the date on which NYSE Group common stock was not in compliance with the listing standard at issue and any other material information conveyed to NYSE Group in the notice of non-compliance. Within five business days of receiving a plan of compliance from the issuer, NYSE Regulation will notify the Commission of such receipt, whether the plan was accepted by NYSE Regulation or what other action was taken with respect to the plan, and the time period provided to regain compliance with the Exchange's listing standard, if any.

#### **Trading Licenses; Access to NYSE Market**

Following the Merger, NYSE Market will issue Trading Licenses to registered broker-dealers, subject to an annual fee to NYSE Market paid in monthly installments, and review and approval of the applicant by NYSE Regulation. Organizations holding Trading Licenses will be subject to rules applicable to member organizations, and except as otherwise noted herein, those rules will be substantively the same as the rules applicable to NYSE member organizations under the NYSE's current Constitution and Rules.<sup>41</sup> Each Trading License will entitle its holder to have physical and electronic access to the trading facilities of NYSE Market, subject to such limitations and requirements as may be specified in the rules, and in each case will include the right to designate a natural person, subject to pre-approval by NYSE Regulation, who may have physical access to the floor and facilities of NYSE Market to trade thereon. The quantity and price of Trading Licenses issued shall be annually determined by a "Dutch auction."

The clearing price at which all Trading Licenses will be sold in the

<sup>40</sup> Proposed NYSE Rule 497 provides for a period of five days. The Exchange has represented that it plans to amend proposed NYSE Rule 497 to change "five days" to "five business days." December 14 Telephone Conversation.

<sup>41</sup> As noted above, the term "member organization" may also include any other registered broker-dealer that agrees to be regulated by NYSE Regulation, notwithstanding that it does not hold a Trading License and thus does not have direct access to the trading facilities of NYSE Market.

auction will be determined under procedures calculated to provide suitable revenue to NYSE Market while providing fair access to its facilities to member organizations that wish to do business there. For each auction NYSE Market will determine the minimum price that a bidder will be required to pay for each Trading License ("Minimum Bid Price"), which will be no greater than 80% of the clearing price at the last annual auction, or for the first auction, 80% of the average annual lease price for leases commenced during a recent six month period.<sup>42</sup> Unpriced "at the market" bids will also be permitted. At the end of the auction, NYSE Market will select as the purchase price for each Trading License the highest bid price that will allow it to sell the number of Trading Licenses that will maximize auction revenue to NYSE Market (referred to as a clearing price), provided that (i) the clearing price shall not be greater than the price that will result in the sale in the auction of at least 1000 Trading Licenses, (ii) NYSE Market will not sell in the auction more than 1366 Trading Licenses, and if the bids at the clearing price bring the total to more than 1366 Trading Licenses, NYSE Market will sell at the clearing price to the unpriced "at the market" bids and higher priced bids, but will allocate trading licenses among the bids at the clearing price by lot, and (iii) NYSE Market at its discretion may sell the number of Trading Licenses determined by the clearing price at a price less than the clearing price but not lower than the Minimum Bid Price. However, if there are insufficient bids at the Minimum Bid Price (including unpriced at the market bids) to purchase at least 1000 Trading Licenses, NYSE Market may, although it need not, sell the largest number of Trading Licenses as can be sold at a price equal to the Minimum Bid Price, even though such number of Trading Licenses is less than 1000. In the alternative, under such circumstances NYSE Market may conduct another auction or auctions, setting a new Minimum Bid Price, which may be lower than that determined by the formula above, and in any such auction the clearing price will be determined as explained above, but without the requirement to sell at least 1000 trading licenses. In such case,

<sup>42</sup> The first auction will also have a maximum price for bids, which will be 120% of the average annual lease price for leases commenced during such recent six month period. This is expected to ease the concerns of existing members given the potentially significant changes to business models that may evolve following the implementation of the Commission's new Regulation NMS and the Exchange's own hybrid market initiative.

NYSE Market will use its discretion to conclude an auction that will best serve the dual goals of raising adequate proceeds for NYSE Market while selling a number of Trading Licenses adequate to serve the needs of investors and the broker-dealer community.

It is also proposed that, in each auction, NYSE Market will limit the number of Trading Licenses that may be bid for by a single member organization to the greater of (i) 35 and (ii) 125% of the number of trading licenses (or in the case of the first auction, regular and electronic access memberships) utilized by the member organization in its business immediately prior to the auction. It is also proposed that the aggregate number of Trading Licenses to be issued in any one year will be limited to 1,366.

Except for the initial Trading Licenses, which will be valid from the closing date of the Merger through the end of the calendar year in which the Merger occurs, each Trading License will be valid for one calendar year.<sup>43</sup> Trading Licenses will not be able to be leased or transferred, although they will be permitted to be transferred to an affiliated member organization, or to another qualified member organization which continues substantially the same business as the Trading License holder. A member organization may terminate a Trading License prior to the expiration of its term in accordance with applicable rules and subject to applicable administrative fees. Trading Licenses will not represent any equity interest in NYSE Group or any of its subsidiaries (including NYSE Market). Holders of Trading Licenses will not have any voting rights or rights to distribution in New York Stock Exchange LLC, NYSE Market or NYSE Group by virtue of their status as holders of Trading Licenses, except to the extent their vote is sought in connection with the petition nomination process described under "Fair Representation of Members" above.

As noted above, the procedures under which Trading Licenses will be made available are calculated to comply with

<sup>43</sup> The NYSE also proposes to provide for the sale of additional Trading Licenses during the year at a premium to the auction price, pro rated for the amount of time remaining for the year, in order to, among other things, ensure that the supply of Trading Licenses is adequate to meet demand for Trading Licenses should conditions change after the auction, and to accommodate new businesses that commence operations after the beginning of the year. This will also accommodate those who under priced their bids in the auction. The premium will help defray out-of-cycle administration costs and encourage participation in the annual auction, thereby promoting the optimal price and quantity discovery in the auction.

the requirements of section 6(b)(2) of the Act regarding fair access to the facilities of a registered exchange. As discussed more fully below, the Dutch auction is itself a fair way to determine access, especially given that it is subject to provisions calculated to insure that Trading Licenses are widely available, such as the provisions (i) specifying a reasonable minimum bid price, (ii) calculating the clearing price with reference to what will sell at least 1000 Trading Licenses, assuming sufficient bids, (iii) limiting the number of Trading Licenses that may be bid for by a single member organization, and (iv) the arrangement to sell additional Trading Licenses during the year at a 10% premium up to the maximum of 1366 Trading Licenses. The procedures under which Trading Licenses will be made available are also intended to comply with the requirements of section 6(b)(4) of the Act, which requires that a registered exchange provide for the equitable allocation of reasonable dues, fees, and charges among its members and issuers and other persons using its facilities. The price for a Trading License is reasonable because it is basically determined by "the market", that is, by the member organizations that wish to obtain a trading license. The Dutch auction allows those member organizations to themselves determine the price, subject to the provisions referenced in clauses (i) to (iv) above which, as noted, are calculated to insure that Trading Licenses are widely available. The minimum bid price is reasonable because it is determined with reference to the prices which member organizations have recently been willing to pay for direct access to the trading facilities. The auction is also closely related to the way access to the New York Stock Exchange was traditionally priced, with supply and demand governing the price at which traditional memberships were purchased or leased. The pricing of Trading Licenses in between auctions is also reasonable, as it is based on the auction price, but with a premium to the auction price that is modest, but hopefully will encourage participation in the auction, which in turn will strengthen the price discovery mechanism that the auction provides.

#### Access to ArcaEx

The Merger will have no effect on the right of any party to trade securities on ArcaEx, a facility of the Pacific Exchange. Any registered broker-dealer who wishes to trade on ArcaEx must become a permit holder by obtaining an equity trading permit from PCX Equities. Broker-dealers that do not hold

such trading permits may have access to ArcaEx through a broker-dealer that is a permit holder.

#### Access to the Pacific Exchange

The Merger will have no effect on the right of any party to trade securities on the trading facilities of the Pacific Exchange. Any registered broker-dealer who wishes to trade on the Pacific Exchange must become a permit holder by obtaining a trading permit from the Pacific Exchange. Broker-dealers that do not hold such trading permits may access the Pacific Exchange through a broker-dealer that is a permit holder.

#### Delegation and Protection of SRO Functions; Services Agreement

##### Overview

Following the Merger, NYSE Group will be the parent company of two national securities exchanges registered under section 6 of the Act: (a) New York Stock Exchange LLC (as the proposed successor to the NYSE); and (b) the Pacific Exchange (which will be held through Archipelago).

Pursuant to the NYSE Delegation Agreement, New York Stock Exchange LLC will delegate the performance of its regulatory functions to NYSE Regulation and the performance of its market functions to NYSE Market.<sup>44</sup> The Pacific Exchange will also contract for the provision of certain of its regulatory functions from NYSE Regulation pursuant to the Pacific Exchange Regulatory Services Agreement.

##### NYSE Delegation Agreement

The NYSE Delegation Agreement will provide that New York Stock Exchange LLC shall delegate to NYSE Regulation, and NYSE Regulation shall assume, the following responsibilities and functions of a registered national securities exchange:<sup>45</sup>

1. To establish and administer rules and regulations, including developing and adopting necessary or appropriate amendments thereto, interpretations, exemptions, policies and procedures relating to the business of New York Stock Exchange LLC members, member organizations and their employees, allied members, and approved persons ("member organizations and persons associated therewith") including, but not limited to regulatory fees, qualifications, reporting and membership requirements, trading, financial, operational, sales practice and

disciplinary rules, and rules governing hearings, arbitrations and dispute resolution.

2. To take necessary or appropriate action to assure compliance with the rules, interpretations, policies and procedures of New York Stock Exchange LLC, the Federal securities laws, and other laws, rules and regulations that New York Stock Exchange LLC has the authority to administer or enforce, through examination, surveillance, investigation, enforcement, disciplinary and other programs.

3. To administer programs and systems for the surveillance and enforcement of rules governing trading on the NYSE Market and any facilities thereof and in NYSE-listed securities by New York Stock Exchange LLC member organizations and persons associated therewith.

4. To review complaints, examine and investigate New York Stock Exchange LLC member organizations and persons associated therewith to determine if they have violated the rules and policies of New York Stock Exchange LLC, the Federal securities laws, and other laws, rules and policies that New York Stock Exchange LLC has the authority to administer, interpret or enforce.

5. To administer New York Stock Exchange LLC enforcement and disciplinary programs, including investigation, adjudication of cases and the imposition of fines and other sanctions. A decision upon appeal to the NYSE Regulation board of directors of disciplinary matters shall be the final action of New York Stock Exchange LLC.

6. To administer New York Stock Exchange LLC's Office of the Hearing Board.

7. To conduct arbitrations, mediations and other dispute resolution programs.

8. To conduct qualification examinations and continuing education programs.

9. To determine whether natural person designees for Trading Licenses and applications for member organizations have met the requirements established by New York Stock Exchange LLC.

10. To place restrictions on the business activities of New York Stock Exchange LLC member organizations and persons associated therewith consistent with the public interest, the protection of investors, the rules and policies of New York Stock Exchange LLC, the federal securities laws, and other laws, rules and policies that New York Stock Exchange LLC has the authority to administer, interpret or enforce.

11. To determine whether persons seeking to register as associated persons of New York Stock Exchange LLC member organizations, including members, have met such qualifications for registration as may be established by New York Stock Exchange LLC, including whether statutorily disqualified persons will be permitted to associate with particular New York Stock Exchange LLC member organizations and members, and the conditions of such association.

12. To determine whether applicants for listing on New York Stock Exchange LLC have met the initial listing requirements established by the New York Stock Exchange LLC and to determine whether listed issues and issuers meet the continuing listing requirements and to administer rules governing listing standards established by the New York Stock Exchange LLC.

13. To coordinate with NYSE Market with respect to the operations of Market Watch.

14. To determine, assess, collect and retain for regulatory purposes such examination, access, registration, qualification, continuing education, arbitration, mediation, dispute resolution and other regulatory fees as may be imposed from time to time and to retain disciplinary fines and penalties as may be imposed in disciplinary actions, for regulatory purposes.

15. To establish the annual budget for NYSE Regulation.

16. To determine allocation of NYSE Regulation resources.

17. To establish and assess fees and other charges on New York Stock Exchange LLC member organizations and persons associated therewith, and others using the services or facilities of NYSE Regulation.

18. To manage external relations on enforcement and regulatory policy issues with Congress, the Commission, state regulators, other self-regulatory organizations, business groups, and the public.

New York Stock Exchange LLC will also delegate performance of the following market functions to NYSE Market pursuant to the NYSE Delegation Agreement:<sup>46</sup>

1. To operate NYSE Market, including automated systems supporting it.

2. To provide and maintain a communications network infrastructure linking market participants for the efficient process and handling of quotations, orders, transaction reports and comparisons of transactions.

<sup>44</sup> See proposed NYSE Rule 20(a).

<sup>45</sup> Note that, of necessity, NYSE Market will be called upon to coordinate with and assist NYSE Regulation in certain of its functions. See *supra* note 29.

<sup>46</sup> Note that, of necessity, NYSE Market will be called upon to coordinate with and assist NYSE Regulation in certain of its functions. See *supra* note 29.

3. To act as a Securities Information Processor for quotations and transaction information related to securities traded on NYSE Market and other trading facilities operated by NYSE Market.

4. To administer the participation of New York Stock Exchange LLC in the National Market System and Commission regulations related thereto.

5. To collect, process, consolidate and provide to NYSE Regulation accurate information requisite to operation of a surveillance audit trail.

6. To develop and adopt rules governing listing standards applicable to securities listed on New York Stock Exchange LLC and the issuers of those securities in consultation with NYSE Regulation.

7. To establish and assess listing fees, access fees, transaction fees, market data fees and other fees for the products and services offered by NYSE Market.

8. To develop, adopt and administer rules governing the issuance of Trading Licenses.

9. To operate Market Watch in coordination with NYSE Regulation and to refer to NYSE Regulation any complaints of a regulatory nature involving potential rule violations by Trading License holders, member organizations or employees.

10. To establish the annual budget for NYSE Market.

11. To determine allocation of NYSE Market resources.

12. To manage external relations on matters related to trading on and the operation and functions of the NYSE Market with Congress, the Commission, state regulators, other self-regulatory organizations, business groups, and the public.

New York Stock Exchange LLC will have ultimate responsibility for the operations, rules and regulations developed by NYSE Regulation and NYSE Market, as well as their enforcement. Actions taken pursuant to delegated authority will remain subject to review, approval or rejection by the board of directors of New York Stock Exchange LLC in accordance with procedures established by that board of directors; *provided that* action taken upon review of disciplinary decisions by the NYSE Regulation board of directors shall be final action of the New York Stock Exchange LLC.

In addition, New York Stock Exchange LLC will expressly retain the following authority and functions:

1. To exercise overall responsibility for ensuring that statutory and self-regulatory obligations and functions of New York Stock Exchange LLC are fulfilled and to perform any duties and functions not delegated.

2. To delegate authority to NYSE Regulation and, to the extent applicable, NYSE Market to take actions on behalf of the New York Stock Exchange LLC.

3. To elect the members of the boards of directors of NYSE Market and NYSE Regulation.

4. To coordinate actions of NYSE Regulation and NYSE Market as necessary.

5. To resolve as appropriate any disputes between NYSE Regulation and NYSE Market.

6. To direct NYSE Regulation and NYSE Market to take action necessary to effectuate the purposes and functions of New York Stock Exchange LLC, consistent with the independence of the regulatory functions delegated to NYSE Regulation, exchange rules, policies and procedures and the Federal securities laws.

The delegation of regulatory functions to NYSE Regulation will be subject to certain provisions designed to ensure the ability of the New York Stock Exchange LLC to comply with its obligations as SRO and to maintain the ability of the Commission to ensure effective oversight of these obligations. Specifically, for so long as NYSE Regulation has any delegated regulatory responsibility pursuant to this Agreement, NYSE Regulation agrees that:

1. To the fullest extent permitted by applicable law, all confidential information pertaining to the self-regulatory function of New York Stock Exchange LLC or any Delegated Regulatory Responsibility (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of New York Stock Exchange LLC or NYSE Market that shall come into the possession of NYSE Regulation shall: (a) Not be made available to any person (other than as provided in the next sentence) other than to those officers, directors, employees and agents of the NYSE Regulation who have a reasonable need to know the contents thereof; (b) be retained in confidence by NYSE Regulation and the officers, directors, employees and agents of NYSE Regulation; and (c) not be used for any commercial purposes; provided, that nothing in this sentence shall be interpreted so as to limit or impede the rights of the Commission or New York Stock Exchange LLC to access and examine such confidential information pursuant to the Federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any officers, directors, employees or agents of NYSE Regulation to disclose such confidential

information to the Commission or New York Stock Exchange LLC.

2. NYSE Regulation's books and records shall be subject at all times to inspection and copying by (a) the Commission and (b) by New York Stock Exchange LLC.

3. NYSE Regulation's books and records shall be maintained within the United States.

4. The books, records, premises, officers, directors and employees of NYSE Regulation shall be deemed to be the books, records, premises, officers, directors and employees of New York Stock Exchange LLC for purposes of and subject to oversight pursuant to the Act.

5. NYSE Regulation shall comply with the Federal securities laws and the rules and regulations thereunder and shall cooperate with the Commission and New York Stock Exchange LLC pursuant to and to the extent of its regulatory authority, and shall take reasonable steps necessary to cause its agents to cooperate, with the Commission and, where applicable, New York Stock Exchange LLC pursuant to their regulatory authority.

6. NYSE Regulation, 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 jurisdiction of the United States Federal courts and the Commission for the purposes of any suit, action or proceeding pursuant to the United States Federal securities laws and the rules and regulations thereunder, commenced or initiated by the Commission arising out of, or relating to, the activities of New York Stock Exchange LLC or any delegated regulatory responsibility (and shall be deemed to agree that NYSE Regulation may serve as the U.S. agent for purposes of service of process in such suit, action or proceeding), and NYSE Regulation and each such director, 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 such suit, action or proceeding is an inconvenient forum or that the venue of such suit, action or proceeding is improper, or that the subject matter thereof may not be enforced in or by such courts or agency.

In addition, for so long as NYSE Regulation has any delegated regulatory responsibility pursuant to the NYSE

Delegation Agreement, New York Stock Exchange LLC agrees that:

1. New York Stock Exchange LLC shall not transfer or assign its membership in NYSE Regulation to another person.

2. New York Stock Exchange LLC shall not use any assets of, or any regulatory fees, fines or penalties collected by, NYSE Regulation for commercial purposes or distribute such assets, fees, fines or penalties to NYSE Group or any other entity other than NYSE Regulation.

In addition, for so long as NYSE Market has any delegated market responsibility pursuant to the NYSE Delegation Agreement, NYSE Market agrees that:

1. To the fullest extent permitted by applicable law, all confidential information pertaining to the self-regulatory function of New York Stock Exchange LLC or any Delegated Market Responsibility (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of New York Stock Exchange LLC or NYSE Regulation that shall come into the possession of NYSE Market shall: (a) Not be made available to any person (other than as provided in the next sentence) other than to those officers, directors, employees and agents of the NYSE Market who have a reasonable need to know the contents thereof; (b) be retained in confidence by NYSE Market and the officers, directors, employees and agents of NYSE Market; and (c) not be used for any commercial purposes; provided, that nothing in this sentence shall be interpreted so as to limit or impede the rights of the Commission or New York Stock Exchange LLC to access and examine such confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any officers, directors, employees or agents of NYSE Market to disclose such confidential information to the Commission or New York Stock Exchange LLC.

2. NYSE Market's books and records shall be subject at all times to inspection and copying by (a) the Commission and (b) by New York Stock Exchange LLC.

3. NYSE Market's books and records shall be maintained within the United States.

4. The books, records, premises, officers, directors and employees of NYSE Market shall be deemed to be the books, records, premises, officers, directors and employees of New York Stock Exchange LLC for purposes of and subject to oversight pursuant to the Act.

5. NYSE Market shall comply with the Federal securities laws and the rules and regulations thereunder and shall cooperate with the Commission and New York Stock Exchange LLC pursuant to and to the extent of its regulatory authority, and shall take reasonable steps necessary to cause its agents to cooperate, with the Commission and, where applicable, New York Stock Exchange LLC pursuant to their regulatory authority.

6. NYSE Market, its directors, officers and employees shall give due regard to the preservation of the independence of the self-regulatory function of New York Stock Exchange LLC delegated to NYSE Regulation and to obligations to investors and the general public and shall not take any actions that would interfere with the effectuation of any decisions by the board of directors or managers of New York Stock Exchange LLC and NYSE Regulation relating to their regulatory functions (including disciplinary matters) or that would interfere with the ability of New York Stock Exchange LLC to carry out its responsibilities under the Act or NYSE Regulation with respect to regulatory responsibilities delegated by New York Stock Exchange LLC.

7. NYSE Market, 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 jurisdiction of the United States Federal courts and the Commission for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws and the rules and regulations thereunder, commenced or initiated by the Commission arising out of, or relating to, the activities of New York Stock Exchange LLC or any delegated market responsibility (and shall be deemed to agree that NYSE Market may serve as the U.S. agent for purposes of service of process in such suit, action or proceeding), and NYSE Market and each such director, 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 such suit, action or proceeding is an inconvenient forum or that the venue of such suit, action or proceeding is improper, or that the subject matter thereof may not be enforced in or by such courts or agency.

For so long as NYSE Market has any delegated market responsibility

pursuant to this Agreement, New York Stock Exchange LLC agrees that New York Stock Exchange LLC may not transfer or assign any of its shares of common stock of NYSE Market.

The NYSE Delegation Agreement may not be modified except pursuant to a written agreement among New York Stock Exchange LLC, NYSE Regulation and NYSE Market; *provided that*, prior to the effectiveness of any such amendment, such amendment shall be filed with, and approved by, the Commission under section 19 of the Act and the rules promulgated thereunder.

#### Services Agreement

Following the Merger, the Pacific Exchange and NYSE Regulation will be parties to a services agreement. The services agreement will ensure that the Pacific Exchange will provide adequate funding to NYSE Regulation so that NYSE Regulation has the capacity to carry out the regulatory services it will provide to the Pacific Exchange.

#### Regulatory Activities of NYSE Regulation

Currently, the regulatory responsibilities of the NYSE are conducted within the NYSE by the following five divisions, collectively referred to as NYSE Regulation: Listed Company Compliance; Member Firm Regulation; Market Surveillance; Enforcement; and Arbitration/Dispute Resolution. In addition, although not currently within NYSE Regulation, the Office of the Hearing Board and the Chief Hearing Officer report to the NYSE board of directors through its regulatory oversight committee rather than to the chief regulatory officer. Regulatory Quality Review ("RQR") is similarly positioned, and the heads of Corporate Audit and RQR likewise report to the regulatory oversight committee in respect of RQR functions. After the Merger, NYSE Regulation will operate as a separate not-for-profit entity, rather than as a division of NYSE Group.

NYSE Regulation will continue to have the same responsibilities as its current responsibilities, and will be contracted to provide certain of the regulatory responsibilities of the Pacific Exchange, and the administration of disciplinary actions, except that the Office of the Hearing Board does not currently (and after the Merger will not) report through or to the chief regulatory officer of NYSE Regulation. The NYSE Regulation board of directors will perform all the functions of the current regulatory oversight committee, with the Office of the Hearing Board and the RQR function reporting to it. After the

Merger, the decisions of the Office of the Hearing Board may be reviewed by the non-management members of the NYSE Regulation board of directors, pursuant to the NYSE Delegation Agreement, or by the Pacific Exchange board of directors as to disciplinary matters affecting Pacific Exchange members and permit holders, pursuant to the Pacific Exchange Regulatory Services Agreement. As noted above, the NYSE Regulation board of directors will create a successor committee to the current regulatory enforcement and listing standards committee of the NYSE board of directors, to be called the Committee for Review. This successor committee will include both NYSE Regulation directors, and other individuals representing member constituencies. It is also expected to include individuals representing investor and listed company constituencies. Any member of the Committee for Review, including the non-director representatives on such committee, will be authorized to call up disciplinary decisions for appellate review, as will the Executive Floor Governors who will constitute the most senior level of practitioner supervision on the trading floor.

NYSE Regulation will determine, assess, collect and retain for regulatory purposes such examination, access, registration, qualification, continuing education, arbitration, dispute resolution and other regulatory fees as may be imposed from time to time, subject to Commission approval. NYSE Regulation expects, for example, to continue to fund its examination programs for assuring financial responsibility and compliance with sales practice rules, testing and continuing education services (the primary functions of Member Firm Regulation), through fees assessed directly on member organizations, that are calculated as a percentage of gross revenues of these member organizations and will fund arbitration and dispute resolution services through assessment of fees.<sup>47</sup>

NYSE Regulation will also receive funding through its agreements with New York Stock Exchange LLC and the Pacific Exchange.<sup>48</sup> No assets of, and no regulatory fees, fines or penalties collected by NYSE Regulation, will be distributed or otherwise used by the rest of NYSE Group. Upon completion of the Merger, NYSE Regulation may undergo

additional structural and governance changes to comply with any rules finally adopted by the Commission following its proposals relating to governance, transparency, oversight and ownership of SROs.

#### Rules of New York Stock Exchange LLC

New York Stock Exchange LLC, as the proposed successor to the NYSE's registration as a national securities exchange, proposes to make a number of amendments to the NYSE Rules, which, after the Merger, will be the rules of New York Stock Exchange LLC.<sup>49</sup> As such, the first proposed amendment is to delete references to "New York Stock Exchange, Inc." in the rules and replace them with "the Exchange."

In addition, under the current business model of the NYSE, in order to effect transactions on the NYSE trading floor, a NYSE member has to own or lease a NYSE membership, or "seat." Upon completion of the Merger, NYSE memberships and leases of those memberships will cease to exist. Instead, they will be replaced with Trading Licenses. NYSE Rules 300 and 300T are proposed to specify the terms under which Trading Licenses will be sold.

The NYSE proposes to amend NYSE Rule 2 to redefine the terms "member" and "member organization" in order to be consistent with the new form of access to the NYSE Market that will result after the Merger. Currently, NYSE Rule 2 cites the definitions found in Section 3 of Article I of the NYSE Constitution. The Proposed Rule Change will delete any reference to the NYSE Constitution and incorporate the new definitions that comport with the fact

that member organizations will be those that hold Trading Licenses, as well as those who do not hold Trading Licenses but have agreed to subject themselves to NYSE Regulation.

In addition, upon completion of the Merger, the governance portion of the NYSE Constitution will be replaced by the proposed governing documents of NYSE Group and affiliated entities. In order to maintain a coherent set of Rules and comply with New York Stock Exchange LLC's obligations as a self-regulatory organization, this Proposed Rule Change seeks to codify any relevant provisions of the non-governance portions of the NYSE Constitution and remove all references to the NYSE Constitution. In order to conform the NYSE Rules, the Exchange proposes to amend those Exchange Rules that make reference to the NYSE Constitution.

The Proposed Rule Change further seeks to amend rules that reference the NYSE board of executives. Upon completion of the Merger, it is contemplated that the NYSE Market and NYSE Regulation boards of directors will establish one or more advisory committees (including industry representatives and representatives of specialists and non-specialists). Designated floor officials, to be called Executive Floor Governors,<sup>50</sup> shall generally have responsibilities of the current floor representatives on the NYSE board of executives. In order to facilitate this transition of authority, those Exchange Rules that refer to the NYSE board of executives Floor Representatives are proposed to be amended.

In addition, Trading Licenses will not be subject to lease or sub-lease. Therefore, various provisions and rules that reference leases will be deleted. The New York Stock Exchange LLC (through NYSE Regulation) will continue to approve member organizations and persons associated therewith, specialists and floor brokers, but will dispense with the requirement for posting and personal sponsors formerly required for members and allied members contained in NYSE Rules 301, 304, and 311. The Exchange proposes to amend certain Exchange Rules to delete references to leases and to amend the definition of "member organization."

Further, the Proposed Rule Change includes proposed new NYSE Rule 20 that sets forth the delegation from the New York Stock Exchange LLC to NYSE Market and NYSE Regulation.

<sup>47</sup> NYSE Regulation will oversee the NYSE Hybrid Market, SM currently being created by the NYSE as the world's first auction/electronic hybrid trading market, through its regulatory program.

<sup>48</sup> At the request of the Exchange, the Commission staff replaced the phrase "services agreement" with "agreements." January 3 Telephone Conversation.

<sup>49</sup> The following NYSE Rules proposed to be amended through this filing are currently the subject of pending, proposed amendments previously filed with the Commission: Rules 103A and 103B (SR-NYSE-2005-40, filed on June 6, 2005); Rule 123A (SR-NYSE-2004-05, filed on February 9, 2004); Rule 123D (SR-2005-46, filed on June 29, 2005); Rule 301 (SR-NYSE-2005-83, filed on November 28, 2005, operative December 5, 2005); Rule 312 (SR-2005-58, filed on August 15, 2005); Rule 325 (SR-NYSE-2005-03, filed on January 5, 2005); Rule 342 (SR-NYSE-2005-22, filed on March 16, 2005; and SR-NYSE-2005-60, filed on August 15, 2005); Rules 475 and 476 (SR-NYSE-2005-37, filed on May 23, 2005); Rule 476A (SR-NYSE-2005-40, filed on June 6, 2005; SR-NYSE-2005-64, filed on September 22, 2005, approved on November 10, 2005; and SR-NYSE-2005-86, filed on December 7, 2005); Rule 600 (SR-NYSE-2005-73, filed on October 20, 2005); and Rule 619 (SR-NYSE-2005-18, filed on February 17, 2005; and SR-NYSE-2005-48, filed on July 13, 2005). At the request of the Exchange, the Commission revised the footnote to correct factual errors. Telephone conversation between James F. Duffy, Senior Vice President and Deputy General Counsel, NYSE, and Kim M. Allen, Special Counsel, Commission, Division, on December 14, 2005.

<sup>50</sup> See proposed NYSE Rule 46A.

The Exchange also proposes to amend NYSE Rule 103B, the Exchange Allocation Policy, with respect to the allocation of NYSE Group stock to (i) give NYSE Group the right to determine the number and identity of specialist firms that will be included in the group from which it shall choose its specialist, provided the group consists of at least four specialist firms, and (ii) provide NYSE Group with the same material with respect to each specialist firm applicant as would have been reviewed by the Allocation Committee in allocating other securities. All other aspects of the policy will continue to apply. It is expected that the independent directors of NYSE Group will select the specialist for NYSE Group common stock.

The Exchange is proposing this change to the Allocation Policy in recognition of the special circumstances involved in determining which of its specialist firms will be the specialist for the NYSE Group's stock. The Exchange is concerned that it would be unreasonable to subject the non-specialist members of the Exchange who serve on the Allocation Committee to the unique pressures involved in making a judgment to remove several of the specialist units from consideration. In effect, they would be subject to a kind of conflict that the Exchange believes would make it difficult for them to bring their impartial judgment to the selection process. The Exchange believes instead that the entire selection decision is best placed in the hands of independent directors, who have no ties to the member community other than their membership on the board. For similar reasons NYSE Group intends to remove its own chief executive officer from the process, in contrast to the typical listing, where it is normally the chief executive that would be entitled to make the final decision on selection of a specialist.

## 2. Statutory Basis

The Exchange believes that this filing, as amended, is consistent with section 6(b) of the Act,<sup>51</sup> in general, and furthers the objectives of section 6(b)(1) of the Act,<sup>52</sup> in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply, and 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, as amended,

further the objectives of section 6(b)(5)<sup>53</sup> of the Act because the rules summarized herein would create a governance and regulatory structure that is designed 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, in general, to protect investors and the public interest.<sup>54</sup>

### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, 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

While the Exchange did not solicit comments on the Proposed Rule Change, it did receive one written comment in a letter dated December 14, 2005 from the Independent Broker Action Committee ("IBAC"). IBAC noted that the Exchange had informed its members that the first Trading License auction would take place on December 20, 2005. IBAC stated that it is improper for the Exchange to hold an auction under the Proposed Rule Change before it has been published for comment and approved by the Commission, and that if the Exchange did so it would prejudice IBAC's ability to comment on Proposed Rule Change.

IBAC has not commented on the substance of the Proposed Rule Change, but rather has objected to proposed Exchange action prior to Commission approval of the Proposed Rule Change. The Exchange does not agree that IBAC would be in any way prejudiced in its ability to comment. Conducting the first auction provisionally would simply give members and others as much certainty as possible as early as possible to plan for post-Merger business, as well as permitting both the Commission and the Exchange the opportunity to observe whether the auction procedures resulted in a fair and orderly pricing of the Trading Licenses and fair access to the facilities of the Exchange.

<sup>53</sup> 15 U.S.C. 78f(b)(5).

<sup>54</sup> The Commission notes that the Exchange has referenced section 6(b)(3) of the Act in connection with the Exchange's discussion of "Fair Representation of Members." See *supra* note and accompanying text. The Commission further notes that the Exchange has referenced sections 6(b)(2) and 6(b)(4) of the Act. See *supra* "Trading Licenses; Access to NYSE Market."

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

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

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

The Exchange is targeting a closing date of January 23, 2006 for the Merger. In the event that it is necessary in order to facilitate that timetable, the Exchange requests that the Commission accelerate effectiveness of the filing pursuant to section 19(b)(2) to a date no later than January 23, 2006.

## 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-NYSE-2005-77 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-NYSE-2005-77. 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

<sup>51</sup> 15 U.S.C. 78f(b).

<sup>52</sup> 15 U.S.C. 78f(b)(1).

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 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 File Number SR-NYSE-2005-77 and should be submitted on or before February 2, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>55</sup>

Nancy M. Morris,  
Secretary.

[FR Doc. 06-299 Filed 1-11-06; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53077; File No. SR-PCX-2005-134]

### Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Certificate of Incorporation and Bylaws of Archipelago Holdings, Inc.

January 9, 2006.

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 December 5, 2005, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On December 15, 2005, the Exchange amended its proposal.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

PCX proposes: (i) To allow NYSE Group, Inc., a Delaware corporation

("NYSE Group"), and its related persons to wholly own and vote all of the outstanding capital stock of Archipelago Holdings, Inc., a Delaware corporation and the parent company of the Exchange ("Archipelago"), upon the consummation of the proposed business combination of Archipelago and New York Stock Exchange, Inc., a New York Type A not-for-profit corporation (the "NYSE"), subject to certain exceptions described herein; (ii) certain new rules of PCX and PCX Equities, Inc. ("PCXE") prohibiting certain relationships between NYSE Group on the one hand and OTP Holders, OTP Firms, and ETP Holders (in each case as defined below) on the other hand; and (iii) to amend the rules of PCX and PCXE to impose certain restrictions on certain rights of OTP Holders and ETP Holders with respect to the nomination and election of the directors of PCX and PCXE.

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

In its filing with the Commission, PCX included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below.<sup>4</sup> PCX 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

a. *The Archipelago NYSE Mergers.* The Exchange is submitting the proposed rule change in connection with the proposed mergers ("Mergers") of the NYSE and Archipelago. Following the Mergers, the businesses of the NYSE and Archipelago will be held under a single, publicly traded holding company named NYSE Group. The Mergers will occur pursuant to the terms of the Agreement and Plan of Merger, dated as of April 20, 2005, as amended and restated as of July 20, 2005, as further amended as of October 20, 2005, and as of November 2, 2005 (as so amended and restated, the "Merger Agreement"), by and among the

NYSE, Archipelago, NYSE Group, NYSE Merger Corporation Sub, Inc., a Delaware corporation and a wholly owned subsidiary of the NYSE, NYSE Merger Sub LLC, a New York limited liability company and a wholly owned subsidiary of NYSE Group, and Archipelago Merger Sub, Inc., a Delaware corporation and a wholly owned subsidiary of NYSE Group.<sup>5</sup> In the Mergers, 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.<sup>6</sup> Archipelago acquired PCX Holdings, Inc. ("PCXH") on September 26, 2005, and is currently the ultimate parent company of PCXH and all of its subsidiaries, including PCX and PCXE.

b. *Ownership Limitation in the Archipelago Certificate of Incorporation.* The Archipelago Certificate of Incorporation was approved by the Commission on August 9, 2004 in connection with the initial public offering of Archipelago.<sup>7</sup> In order to ensure that the ownership of Archipelago by the public 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 and generally to enable the Archipelago Exchange, L.L.C. ("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,<sup>8</sup> the Archipelago Certificate of Incorporation imposes certain ownership and voting limitations with respect to the stock of Archipelago.

Specifically, the Archipelago Certificate of Incorporation provides that no person,<sup>9</sup> either alone or together with its related persons,<sup>10</sup> may own

<sup>5</sup> For a description of the Merger Agreement and the transactions contemplated thereby, see Amendment No. 3 to the Registration Statement on Form S-4, Registration No. 333-126780, filed with the Commission on November 3, 2005 ("S-4 Registration Statement"), at 125-147.

<sup>6</sup> *Id.*

<sup>7</sup> See Securities Exchange Act Release No. 50170, 69 FR 50419 (August 16, 2004).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> The Archipelago Certificate of Incorporation defines "Person" to mean a natural person, company, government, or political subdivision, agency, or instrumentality of a government. Archipelago Certificate of Incorporation, Article Fourth H(2).

<sup>10</sup> The Archipelago 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 Archipelago 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

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<sup>55</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> Amendment No. 1 replaced PCX's original filing in its entirety.

<sup>4</sup> Exhibit 5.A (Resolutions Adopted at the October 20, 2005 Regular Meeting of the Board of Directors of Archipelago Holdings, Inc.), Exhibit 5.B (Proposed PCX Rules), and Exhibit 5.C (Proposed PCXE Rules) of the proposed rule change are also available on the Commission's Web site (<http://www.sec.gov/rules/sro.shtml>).