



RULE
ADOPTION
NOTICE

RAN-05-33
April 28, 2005

TO: ETP Holders and Sponsored Participants

FROM: Department of Regulatory Policy

SUBJECT: Corporate Governance for Listed Companies
(File No. SR-PCX-2005-38)

On April 18, 2005, the Exchange filed with the Securities and Exchange Commission a proposal to amend its rules relating to Corporate Governance for Listed Companies. The Exchange filed Amendment No. 1 to the proposal on April 21, 2005. The proposed rule filing was effective upon filing.

The following is the text of the rule change. Questions regarding this bulletin may be directed to Steven Matlin at (415) 393-4084.

EXHIBIT 5
Text of the Proposed Rule Change:¹

Rules of the
PCX Equities, Inc.

Rule 5

Listings

Corporate Governance and Disclosure Policies

Rule 5.3 – 5.3(j) – No Change.

Rule 5.3(k). Independent Directors/Board Committees

The Corporation shall require that each listed domestic issuer have a majority of independent directors on its board of directors, except that a listed domestic issuer of which more than 50% of the voting power is held by an individual, a group or another company, a limited partnership and any company in bankruptcy need not have a majority of independent directors on

¹ New text is underscored; deleted text is in brackets.

its board or have nominating/corporate governance and compensation committees composed of independent directors as set forth in Rule 5.3(k). However, all such controlled companies, limited partnerships and any company in bankruptcy must have at least a minimum three person audit committee and otherwise comply with the audit committee requirements provided for in this Rule 5.3(k)(5).

(1) *Independent Directors.* For purposes of this Rule 5.3(k), no director qualifies as independent unless the board of directors affirmatively determines that the director has no material relationship with the listed company, either directly or as a partner, shareholder or officer of an organization that has a relationship with the company. Companies must identify which directors are independent and disclose the basis for that [these] determination[s]. The identity of the independent directors and t[T]he basis for a board determination that a relationship is not material must be disclosed in the company's annual proxy statement (or, if the issuer does not file a proxy, in its Form 10-K, 20-F or N-CSR). A board may adopt and disclose categorical standards to assist it in making determinations of independence and may make a general disclosure if a director meets these standards. Any determination of independence for a director who does not meet these standards must be specifically explained. A company must disclose any standard it adopts. In the event that a director with a business or other relationship that does not fit within the disclosed standards is determined to be independent, a board must disclose the basis for its determination.

In addition, the following directors do not qualify as independent directors:

(A) A director who is or has been within the last three years, an employee of the listed company [or former employee], or whose immediate family member is or has been within the last three years an executive officer of the listed company [whose employment ended within the past three years]. Employment as an interim Chairman or CEO or other executive officer shall not disqualify a director from being considered independent following that employment. For purposes of this rule the term executive officer shall have the same meaning as "officer" as set forth in Rule 16a-1(f) under the Securities and Exchange Act of 1934.

(B)(i) A director or a director who has an immediate family member who is a current partner of a firm that is the company's internal or external auditor;[,]

(ii) A director who is a current employee of such a firm;

(iii) A director who has an immediate family member who is a current employee of such a firm and who participates in the firm's audit, assurance or tax compliance (but not tax planning) practice; or

(iv) A director or a director who has an immediate family member who was within the last three years (but is no longer) a partner or employee of such a firm and personally worked on the listed company's audit within that time [or in the past three years has been, affiliated with or employed by a (present or former) auditor of the company (or of an affiliate). Such director cannot be independent until three years after the end of either the affiliation or the auditing relationship].

(C) A director or a director who has an immediate family member who is, or in the past three years has been, part of an interlocking directorate in which an executive officer of the listed company serves or served on the compensation committee of another company that concurrently employs or employed the director.

(D) Reserved. [A director with an immediate family member in any the foregoing categories. Immediate family includes a person's spouse, parents, children, siblings, mothers-in-law and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and anyone (other than employees) who shares such person's home.]

(E) A director who is an executive officer or an employee, or whose immediate family member is an executive officer, of a company that makes payments to, or receives payments from, the listed company for property or services in an amount which, in any single fiscal year, exceeds the greater of \$200,000 or 5% of such other company's consolidated gross revenues, is not "independent" until three years after falling below such threshold. For purposes of this rule, [charitable] contributions to tax exempt organizations shall not be considered "[companies] payments", provided however that a listed company shall disclose in its annual proxy statement, or if the listed company does not file an annual proxy statement, in the company's annual report on Form 10-K filed with the SEC, any [charitable] such contributions made by the listed company to any [charitable] tax exempt organization in which any independent director serves as an executive officer if, within the preceding three years, contributions in any single fiscal year from the listed company to the organization exceeded the greater of \$200,000 or 5% of such [charitable] tax exempt organization's consolidated gross revenues. At any time, however, when an issuer has a class of securities that is listed on and meets the requirements of a similar rule of [a national securities exchange or national securities association other than the Corporation and is subject to requirements substantially similar to those set forth in this Section 5.3(k)(1)(E)] the New York Stock Exchange or the National Association of Securities Dealers (for the Nasdaq National Market or Small Cap Market), the issuer shall not be required to separately meet the requirements set forth in this Section 5.3(k)(1)(E). [above. Governance requirements of other markets will be considered to be substantially similar to the requirements above if they are adopted by the New York Stock Exchange or the National Association of Securities Dealers (for the Nasdaq National Market or Small Cap Market).]

(F) A director who receive[s]d, or whose immediate family member is an executive [employee] officer who receive[s]d, during any twelve-month period within the last three years, more than \$100,000 [per year] in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service). [Such director shall not be independent until three years after he or she ceases to receive more than \$100,000 per year in such compensation.] Compensation received by a director for former service as an interim Chairman or CEO or other executive officer need not be considered in determining independence under this test. For purposes of this rule the term executive officer shall have the same meaning as "officer" as set forth in Rule 16a-1(f) under the Securities and Exchange Act of 1934.

(G) In the case of an investment company, in lieu of paragraphs (A)-(F), a director who is an "interested person" of the company as defined in section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee.

(H) As used throughout this rule, the term "immediate family member" includes a person's spouse, parents, children, siblings, mothers-in-law and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and anyone (other than employees) who shares such person's home.

Transition Rule: Each of the above standards contains a three-year "look back" provision. In order to facilitate a smooth transition to the new independence standards, the Corporation will phase in the "look back" provision by applying only a one-year look back for the first year after adoption of these new standards. The three year look back will begin to apply only from and after June 4, 2005.

Due to this proposed tightening of the independence test and to avoid a sudden change to the status of a current director, companies will have until their first annual meeting after June 30, 2005 to replace a director who was independent under the prior test but who is not independent under the current test.

(2) *Regularly Scheduled Non-Management Directors Executive Sessions.* The non-management directors of each listed company must meet at regularly scheduled executive sessions without management. Non-management directors are all those who are not [company] executive officers, and includes such directors who are not independent by virtue of a material relationship, former status or family membership, or for any other reason. [There need not be a single presiding director] A non-management director must preside over each executive session of the non-management directors, although the same director is not required to preside at all executive sessions of the non-management directors. If one director is chosen to preside at all of these meetings, his or her name must be disclosed in the listed company's annual proxy statement, or if the company does not file an annual proxy statement, in the company's annual report on Form 10-K filed with the SEC. Alternatively, if the same individual is not the presiding director at every meeting, a listed company [may] must disclose the procedure by which a presiding director is selected for each executive session. In order that interested parties may be able to make their concerns known to the non-management directors, a listed company must disclose a method for such parties to communicate directly with the presiding director or with the non-management directors as a group. Such disclosure must be made in the listed company's annual proxy statement or, if the company does not file an annual proxy statement, in the company's annual report on Form 10-K filed with the SEC. If the non-management directors include directors who are not independent, then the company should at least once a year schedule an executive session including only independent directors.

(3) *Nominating/Corporate Governance Committee.* Listed companies must have a Nominating Committee/Corporate Governance Committee composed entirely of independent directors, except that if such committee is made up of three or more individuals, then one member of the committee need not be an independent director. The director who is not

independent may not be a current officer or employee or immediate family member of an officer or employee. Such individual may be appointed to the Nominating/Corporate Governance Committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the proxy statement for the next annual meeting subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for the determination. The member appointed under this exception may not serve for longer than two years. The committee must have a written charter that addresses:

(A) The committee's purpose, which at a minimum, must be to: identify individuals qualified to become board members, and to select, or to recommend that the board select, the director nominees for the next annual meeting of shareholders; and develop and recommend to the board a set of corporate governance [principles] guidelines applicable to the company.

(B) The committee's goals and responsibilities, which must reflect, at a minimum, the board's criteria for selecting new directors, and oversight of the evaluation of the board and management.

(C) An annual performance evaluation of the committee.

(D) Committee member qualifications, committee member appointment and removal, committee structure and operations (including authority to delegate to subcommittees), and committee reporting to the board.

(E) The committee's authority to retain and terminate any search firm to be used to identify director candidates, including the sole authority to approve the search firm's fees and other retention terms.

If a company is required by contract or otherwise to provide third parties with the ability to nominate directors (for example, preferred stock rights to elect directors upon a dividend default, shareholder agreements, and management agreements), the selection and nomination of such directors need not be subject to the nominating committee process.

Boards may allocate the responsibilities of the nominating/corporate governance committee and the compensation committee to committees of their own denomination, provided that the committees are composed entirely of independent directors, except that if such committee is made up of three or more individuals, then one member of the committee need not be an independent director. Any such committee must have a published committee charter.

Controlled companies, limited partnerships and any company in bankruptcy need not comply with the requirements of this provision.

(4) *Compensation Committee.* Listed companies must have a compensation committee composed entirely of independent directors, except that if such committee is made up of three or more individuals, then one member of the committee need not be an independent director. The

director who is not independent may not be a current officer or employee or immediate family member of an officer or employee. Such individual may be appointed to the Compensation Committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the proxy statement for the next annual meeting subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for the determination. The member appointed under this exception may not serve for longer than two years. The committee must have a written charter that addresses:

(A) The committee's purpose which, at a minimum, must be to discharge the board's responsibilities relating to compensation of the company's executives, and to produce an annual report on executive officer compensation for inclusion in the listed company's proxy statement (or, if the issuer does not file a proxy, in its Form 10-K or 20-F), in accordance with applicable rules and regulations.

(B) The committee's duties and responsibilities, which at a minimum, must be to:

(i) Review and approve corporate goals and objectives relevant to CEO compensation, evaluate the CEO's performance in light of those goals and objectives, and, either as a committee or together with the other independent directors (as directed by the board), determine and approve [set] the CEO's compensation level based on this evaluation.

(ii) Make recommendations to the board with respect to non-CEO executive officer compensation, and incentive-compensation [plans] and equity-based plans that are subject to board approval.

(C) An annual performance evaluation of the compensation committee.

(D) Committee member qualifications, committee member appointment and removal, committee structure and operations (including authority to delegate to subcommittees), and committee reporting to the board.

(E) The committee's authority to retain and terminate a consultant to assist in the evaluation of a director, CEO or senior executive compensation. The committee shall have the sole authority to approve the consultant's fees and other retention terms.

Controlled companies, limited partnerships and any company in bankruptcy need not comply with the requirements of this provision.

(5) *Audit Committee.*

(A) General Provisions.

(i) Each listed company must have an audit committee as defined by Section 3(a)(58) of the Securities and Exchange Act of 1934. The audit committee must be composed entirely of independent directors. The audit committee must comply with all the rules and procedures set forth in Rule 10A-3 of the Securities and Exchange Act of 1934. If a member of the audit committee ceases to be independent for reasons outside the member's reasonable control, that person, with notice by the issuer to the Corporation, may remain an audit committee member of the listed issuer until the earlier of the next annual meeting or special meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent. Should an individual who ceases to be independent for reasons outside the member's reasonable control remain a member of the audit committee after the time permitted by this Rule 5.3(k)(5)(A)(i), then the Corporation shall remove the issuer's securities from listing pursuant to the procedures set forth in Rule 5.5(m).

(ii) Listed issuers, other than foreign private issuers and small business issuers (as defined in Rule 12b-2 of the Securities and Exchange Act of 1934), must be in compliance with this Rule 5.3(k)(5)(A) by the earlier of their first annual shareholders meeting after January 15, 2004, or October 31, 2004. Foreign private issuers and small business issuers must be in compliance with this Rule 5.3(k)(5) by July 31, 2005.

(iii) If an executive officer of a listed issuer becomes aware of any material noncompliance by the listed issuer with the requirements of this Rule 5.3(k)(5), the listed issuer must promptly notify the Corporation of such noncompliance.

(iv) To be eligible for continued listing, a listed issuer must comply with all of the requirements set forth in this Rule 5.3(k)(5). Except as provided for in Rule 5.3(k)(5)(A)(i), should a listed issuer fail to comply with any of the requirements set forth in this Rule 5.3(k)(5) for a period of six (6) consecutive months, then the Corporation shall remove the issuer's securities from listing pursuant to the procedures set forth in Rule 5.5(m). A listed issuer who is not in compliance with the requirements of Rule 5.3(k)(5) must provide the Corporation with a plan of remediation within 15 days after notifying the Corporation of such noncompliance. The listed issuer must provide the Corporation with written monthly updates on the progress of the plan of remediation.

(v) Audit committees for investment companies must also establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or audit matters by employees of the investment advisor, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company. This responsibility must be addressed in the audit committee charter.

(B) Written Charter. The audit committee must have a written charter that addresses:

(i) The committee's purpose which, at a minimum, must be to:

(a) Assist board oversight of (1) the integrity of the listed company's financial statements, (2) the listed company's compliance with legal and regulatory requirements, (3) the independent auditor's qualifications and independence, and (4) the performance of the listed company's internal audit function and independent auditors.

(b) Prepare the report that SEC rules require be included in the listed company's annual proxy statement (or, if the issuer does not file a proxy, in its Form 10-K, 20-F or N-CSR).

(ii) The duties and responsibilities of the audit committee, which, at a minimum, must be to:

(a) Be directly responsible for the appointment, compensation, retention, and oversight of the work of any registered public accounting firm engaged (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the listed issuer, and each such registered public accounting firm must report directly to the audit committee.

(b) At least annually, obtain and review a report by the independent auditor describing the firm's internal quality control procedures; any material issues raised by the most recent internal quality-control review, or peer review, of the firm, or by any inquiry or investigation by governmental or professional authorities, within the preceding five years, respecting one or more independent audits carried out by the firm, and any steps taken to deal with any such issues; and (to assess the auditor's independence) all relationships between the independent auditor and the listed company.

(c) Meet to review and discuss the listed company's annual audited financial statements and quarterly financial statements with management and the independent auditor, including reviewing the company's specific disclosure under "Management Discussion and Analysis of Financial Condition and Results of Operations."

(d) Discuss earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies.

(e) Engage independent counsel and other advisers, as it determines necessary to carry out its duties.

(f) Discuss policies with respect to risk assessment and risk management.

(g) Meet separately, periodically, with management, with internal auditors (or other personnel responsible for the internal audit function) and with independent auditors.

(h) Review with the independent auditor any audit problems or difficulties and management's response.

(i) Set clear policies for hiring employees or former employees of the independent auditors.

(j) Report regularly to the board of directors.

(k) Review major issues regarding accounting principles and financial statement presentations; including any significant changes in the company's selection or application of accounting principles, and major issues as to the adequacy of the company's internal controls and any special audit steps adopted in light of material control deficiencies.

(l) Review analyses prepared by management and/or the independent auditor setting forth significant financial reporting issues and judgments made in connection with the preparation of the financial statements, including analyses of the effects of alternative GAAP methods on the financial statements.

(m) Review the effect of regulatory and accounting initiatives, as well as off-balance sheet structures, on the financial statements of the company.

(n) Review earnings press releases (paying particular attention to any use of "pro forma," or "adjusted" non-GAAP, information), as well as financial information and earnings guidance provided to analysts and rating agencies.

(o) Establish procedures for: (1) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters and (2) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting, internal accounting controls or auditing matters.

(iii) An annual performance evaluation of the audit committee.

(C) Composition/Expertise Requirement of Audit Committee Members.

(i) Each audit committee will consist of at least three independent directors, as defined in Rule 5.3(k)(1).

(ii) Each member of the audit committee must be financially literate, as such qualification is interpreted by the company's board of directors in its business judgment, or must become financially literate within a reasonable period of time after his or her appointment to the audit committee.

(iii) At least one member of the audit committee must have accounting or related financial management expertise, as the board of directors interprets such qualification in its business judgment.

(D) Written Affirmation.

As part of the initial listing process, and with respect to any subsequent changes to the composition of the audit committee, and otherwise [approximately] once each year, each company shall provide the Exchange written confirmation regarding:

(i) Any determination that the company's board of directors has made regarding the independence of directors.

(ii) The financial literacy of the audit committee member.

(iii) The determination that at least one of the audit committee members has accounting or related financial management expertise.

(iv) The annual review and reassessment of the adequacy of the audit committee charter.

Beginning June 30, 2005 the company must submit the written affirmation no later than 30 calendar days after the company's annual meeting. If the company's 2005 annual meeting occurs prior to June 30, 2005, the company must submit a written affirmation for the year 2005 no later than December 31, 2005.

5.3(k)(5)(E) – 5.3(l) – No Change.

5.3(m) CEO Certification

Each listed company CEO must certify to the Corporation each year that he or she is not aware of any violation by the company of the Corporation's corporate governance listing standards, qualifying the certification to the extent necessary. The certification filed with the Corporation, including any qualifications to that certification, as well as the CEO/CFO certifications required to be filed with the SEC regarding the quality of the company's public disclosure, must be disclosed in the listed company's annual report to shareholders. Beginning June 30, 2005 the company must submit the certification to the Corporation no later than 30 calendar days after the company's annual meeting. If the company's 2005 annual meeting occurs prior to June 30, 2005, the company must submit the certification for the year 2005 no later than December 31, 2005.

Each listed company's CEO must promptly notify the Corporation after any executive officer of the listed company becomes aware of any material non-compliance with any applicable provision of Section 5.3.

Each listed company must submit an executed written affirmation annually to the Corporation. Beginning June 30, 2005 the company must submit the written affirmation no later than 30 calendar days after the company's annual meeting. If the company's 2005 annual meeting occurs prior to June 30, 2005, the company must submit a written affirmation for the year 2005 no later than December 31, 2005. In addition, each listed company must submit an interim Written Affirmation each time a change in the membership occurs of the board or any of

the committees subject to Rule 5.3(k).

Rule 5.3(n) – (o) – No Change.

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